Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RAFAEL GARCIA,

Petitioner,

v.

CITY OF CHICAGO; JACK O'MALLEY, STATE'S ATTORNEY OF COOK COUNTY; MICHAEL F. SHEAHAN, SHERIFF OF COOK COUNTY; and C. RICHARD ENGLISH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. SHOULD THIS COURT RULE FOR THE FIRST TIME THAT AN OFFICIAL GOVERNMENTAL POLICY OR CUSTOM WHICH ROUTINELY DISPENSES WITH THE IN-PERSON PRESENCE OF A PERSON ARRESTED WITHOUT A WARRANT VIOLATES THE U.S. CONSTITUTION?

2. DOES THE FOURTH AMENDMENT COMPEL RELEASE OF A PERSON HELD IN CUSTODY AND AWAITING FURTHER HEARING OR TRIAL WITHIN 48 HOURS OF THE TIME OBJECTIVE PROOF OF INNOCENCE IS DISCOVERED?

3. WHEN A PERSON IS ARRESTED WITHOUT A WARRANT ON A CHARGE OF POSSESSION OR SALE OF A CONTROLLED SUBSTANCE, DOES FAILURE TO PERFORM A CONFIRMATORY CHEMICAL TEST WITHIN A REASONABLE TIME RESULT IN A FOURTH AMENDMENT SEIZURE?

4. SHOULD ACTIONS BROUGHT AGAINST A STATE'S ATTORNEY IN HIS OFFICIAL CAPACITY BE REMANDED FOR REINSTATEMENT IF THIS COURT ANSWERS THE FIRST QUESTION IN THE AFFIRMATIVE?

PARTIES TO THE PROCEEDINGS

The only parties in this matter, both in the United States District Court and in the United States Court of Appeals for the Seventh Circuit were:

Plaintiff: RAPHAEL GARCIA

Defendants: MICHAEL F. SHEAHAN, SHERIFF OF COOK COUNTY; JACK O'MALLEY, STATE'S ATTORNEY OF COOK COUNTY; C. RICHARD ENGLISH, ACTING EXECUTIVE DIRECTOR, COOK COUNTY DEPARTMENT OF CORRECTIONS; CITY OF CHICAGO. ANNA GALL and COUNTY OF COOK were Defendants in the trial court. All claims against them were dismissed in the trial court, and they are not parties to this appeal. Some claims against CITY OF CHICAGO were settled in the trial court, but CITY OF CHICAGO is a party to this appeal.

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CITATIONS TO OPINIONS BELOW

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JURISDICTIONAL STATEMENT

The court's jurisdiction is invoked pursuant to 28 USC 1254. The Court of Appeals opinion was filed on May 19, 1994. Plaintiff filed a timely Petition for Rehearing which contained a suggestion for rehearing en banc. The Petition was denied August 15, 1994. The present Petition is timely, pursuant to 28 USC 2101 (c) and Supreme Court Rules 13.1 and 13.4, since the time for filing this Petition runs from August 15, 1994 when the Petition for Rehearing was denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 4

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue. but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC § 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

At all times in question in this case, the following statute of the State of Illinois was codified as CHAPTER 38, SECTION 109-1, ILLINOIS REVISED STATUTES. It has since been recodified as 725 ILCS 5/109-1, with the ILCS standing for "Illinois Compiled Statutes".

§ 109-1. Person arrested. (a) A person arrested with or without a warrant shall be taken without unnecessary delay before the nearest and most accessible judge in that county, except when such county is a participant in a regional jail authority, in which event such person may be taken to the nearest and most accessible judge, irrespective

of the county where such judge presides, and a charge shall be filed. Whenever a person arrested either with or without a warrant is required to be taken before a judge, and such person is in a different building than the building in which the judge is located, a charge may be filed against such person by way of a two-way closed circuit television system, except that a hearing to deny bail to the defendant may not be conducted by way of closed circuit television.

(b) The judge shall:

(1) Inform the defendant of the charge against him and shall provide him with a copy of the charge.

(2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113-3 of this Code.

(3) Schedule a preliminary hearing in appropriate cases; and

(4) Admit the defendant to bail in accordance with the provisions of Article 110 of this Code.

(c) The court may issue an order of protection in accordance with the provisions of Article 112A of this Code.

STATEMENT OF THE CASE

On March 15, 1991, Officer Anna Gall arrested Garcia. (R. 259) Officer Gall showed Garcia a small plastic bag containing white powder that she said she had recovered near his feet. (R. 261) Garcia at that time verbally denied the bag was his or that he ever had it or any similar bag. He alleged he had never been a user or seller of cocaine or of any controlled substance. (R. 261) Garcia's position was that this was a "drop" by Officer Gall to maintain control over Garcia. (R. 265) During the arrest, Officer Gall struck Garcia in the head with her flashlight while he was handcuffed wrist to wrist behind his back (R. 259)

After Garcia's arrest, Chicago Police Department personnel transported him to St. Mary of Nazareth Hospital, where he was admitted. (R. 260) He was held under 24-hour police guard handcuffed to his hospital bed. The officers who guarded him on March 15, 1991, were Chicago Police Officers. From March 16 through March 20, 1991, Garcia was guarded by personnel of the Cook County Sheriff's office. (R. 61, 260) On March 16, 1991, while Garcia remained in the hospital, a probable cause hearing was held before Judge A.C. Cunningham of the Circuit Court of Cook County. (R. 262) Officer Gall had signed a "Complaint for Preliminary Examination" charging that Garcia was knowingly in possession of cocaine, but otherwise reciting no facts indicating why the substance was cocaine. (R. 210, 262) Officer Gall did

not taste or otherwise test the substance before signing the complaint. (R. 262) Officer Gall did not otherwise testify at the hearing. (R.278-279) Judge Cunningham made a finding of probable cause based on the "signed and sworn police report". The Public Defender was appointed as counsel for Garcia, who stated she had no opportunity to interview him, and asked for a "reasonable bond". (R. 278) The prosecuting attorney stated that Garcia was on two years probation for "possession stolen motor vehicle and burglary." and requested "leave to file a Violation of Probation". (R. 278) Such a Petition was filed, but probation was not expressly revoked (R. 289). No bail was allowed, and Judge Cunningham set bond at $10,000 for possession of a controlled substance, and $25,000 for violation of

probation (R. 278-79) and the case was continued to March 18, 1991.

On March 18, 1991, the case was called before Judge Oliver M. Spurlock of the Circuit Court of Cook County. The prosecuting attorney and public defender were present. The clerk stated: "In custody, Raphael Garcia." On motion of the prosecutor, the case was continued to April 10, 1991. That constituted all the proceedings on that date. (R. 281-282) On March 20, 1991, Garcia was released from the hospital, and transported by personnel of the Sheriff's office to Cook County Jail and incarcerated there where he remained until April 15, 1991 (R. 62) when he appeared in court for the first time. (R. 284-290)

The "white powder" substance which Officer Gall claimed she found near

Garcia's feet was sent to a Chicago Police Department laboratory for testing. The Chicago Police Department rarely if ever performs "field tests" on a substance suspected to be cocaine (R. 271) The Department instead conducts tests to determine the presence of cocaine at its central laboratory, and such tests commonly take ten to twenty days to perform (R. 271) The laboratory does not perform tests faster upon suspected narcotics taken from arrestees who remain incarcerated than it does for arrestees who have posted bond. (R. 274) The laboratory personnel who perform the tests to determine the presence of cocaine have no way of knowing whether a specific person from whom the substance being tested was allegedly taken is or remains incarcer-

ated while the test results are being awaited and also have no way of knowing in the event of a negative test result whether the test result should be conveyed to the office of the State's Attorney or the Public Defender on a rush basis. (R. 271)

At the time of Garcia's arrest, a field test kit known as a "cobalt thiocyanate spot test" was commercially available. (R. 270) This test kit is inexpensive and easy to use. If such a test had been available at the police station to which Garcia was taken, it would have confirmed within 1 1/2 hours that the white powder allegedly seized from him was not cocaine. (R. 270)

On March 26, 1991, the Chicago Police Department laboratory tested the powder allegedly found near Garcia's

feet, and found it to be negative for any controlled substance. (R. 262)

At a hearing on April 10, 1991, before Judge Mary Maxwell Thomas of the Circuit Court of Cook County, the criminal charges against Garcia were nolle prossed. (R. 263) On April 12, 1992, Judge Thomas entered an order reinstating the plaintiff's probation status. (R. 263) Garcia was released from Cook County Jail on April 15, 1991, after appearing before Judge Thomas that day. (R. 259-261)

ARGUMENT

I. A DELIBERATE POLICY OF DISPENSING WITH THE PERSONAL APPEARANCE OF THE ARRESTEE AT A PROBABLE CAUSE HEARING SHOULD BE DECLARED TO BE A VIOLATION OF THE FOURTH AMENDMENT

This court should grant review in this case because of an issue of pressing importance in the law of arrest and detention which has never been ruled on by the court.

Petitioner, Raphael Garcia ("Garcia") alleged that his probable cause hearing took place the day after his arrest at a time when he was in a hospital under guard by deputies of the Sheriff of Cook County and handcuffed to his bed.

In County of Riverside v. McLaughlin, 111 SCt 1621 (1991) the Supreme Court was able to decide the case without reaching the issue of whether an in-person appearance before a judicial officer of a person arrested without warrant was a constitutionally indispensable requirement. By contrast, in McLaughlin v. County of Riverside, 888 F2d 1276 (9th Cir 1989), the Ninth Circuit held that the Fourth Amendment does not grant warrantless arrestees a right to attendance at a probable cause determination. As will be pointed out later, two other circuits have agreed with the Ninth Circuit. So at present the law as articulated in lower federal court decisions is that no in personam appearance of the arrestee is required.

In McLaughlin, the Supreme Court held that jurisdictions providing a probable cause determination within 48 hours of a warrantless arrest are immune from systematic challenges. Detention for more than 48 hours without such a hearing is presumed excessive and may only be justified by "a bonafide emergency or other extraordinary circumstance." (111 SCt at 1670) The quoted language seems to underscore the importance which the Supreme Court places on such a hearing. But does the hearing require the actual physical presence of the arrestee unless an "emergency or extraordinary circumstance" excuses it? That is the question presented in this appeal. This issue is sufficiently important so that, in granting review in this case, at least the Supreme Court can consider and contemplate the prob-

lems which surround the absence of the arrestee at a probable cause hearing.

In Gerstein v. Pugh, 420 US 103, 95 SCt 854 (1975) the Supreme Court held that the Fourth Amendment requires a judicial determination of proximate cause as a prerequisite to extended restraint of liberty following arrest, unless the arrest is supported by a warrant or a grand jury indictment. The rationale is that a warrantless arrest is justified by fear that without immediate detainment the suspect might flee. Once the suspect is in custody, there is no justification for dispensing with a neutral judicial officer's determination of probable cause. (420 US at 113-14) A probable cause determination "is required only for those suspects who suffer restraints on liberty other than

the condition that they appear for trial." (420 US at 125 N. 26) The Supreme Court has clearly stated that a Gerstein hearing is not required to be conducted in a fully adversarial fashion, but may be relatively informal, with both hearsay and written testimony admissible. (420 US at 120-122) Gerstein stated that the "sole issue" at such a hearing is whether there is probable cause to believe that the suspect commited an offense. (420 US at 120-121) This is interpreted literally by commentators. 82 GEORGETOWN L.J., Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993, at 836 (1994) Is this an overstatement requiring clarification by the Supreme Court? Other functions of a probable cause hearing are of sufficiently grave importance

that the "sole issue" viewpoint needs refocusing.

There are actually three discrete sources of rights of a warrantless arrestee at a probable cause hearing: (1) state laws; (2) Rule 5 of the Federal Rules of Criminal Procedure, and (3) federal constitutional law. Although a determination of probable cause is certainly the paramount function of the Gerstein hearing, it is crystal clear that in a hearing before a federal magistrate other considerations are highly important. Rule 5 of the Federal Rules of Criminal Procedure establishes procedures for the conduct of a federal hearing. The procedural checklist in Rule 5 raises questions whether, except in the most exigent circumstances, such a hearing can be conducted without the

arrestee present in person or by closed-circuit television equipment. Rule 5(a) provides that the arresting officer shall take "the arrested person" before a magistrate and that when such person "appears initially before the magistrate" the procedure follows the other applicable subdivisions of Rule 5. The magistrate must inform the suspect of certain rights: to remain silent, to retain an attorney, to avoid making statements that may be used against the arrestee, the right to a preliminary examination, to allow reasonable time to consult with an attorney, and finally, to the right to set or deny bail.

Where a state law criminal charge is involved, the usual source of rules for the conduct of the probable cause hearing is a state statute. The Illinois

statute, 725 ILCS 5/109-1, is very specific on the conduct of such a hearing. The complete text appears under the "Constitutional and Statutory Provisions Involved" portion of this Petition. Notably, closed-circuit television is provided for if the person arrested "...is in a different building than the building in which the judge is located..." There is one exception to the TV rule, which is that a hearing to deny bail may not be conducted by way of closed-circuit television.

The Supreme Court has held that a warrantless arrestee is not entitled to counsel at the probable cause hearing on the basis that it is not a "critical stage" of the prosecution at which the absence of counsel would significantly impair the defense on the merits. (Ger-

stein, 420 US at 122-23) But the Court has never so much as hinted that the permitted informality of such a hearing could trigger a deliberate or routine state policy of dispensing with the physical presence of the arrestee at the hearing. In addition to the Ninth Circuit in McLaughlin, two other federal circuits have held that the lack of a "face-to-face" appearance before a judicial officer does not make a probable cause hearing unconstitutional. King v. Jones, 824 F2d 324, 327 (4th Cir 1987); Blake v. Katter, 693 F2d 677, 681 (7th Cir 1982). It is submitted that these authorities need to be re-examined by the Supreme Court in the light of the McLaughlin "other extraordinary circumstance" rule.

Garcia, as a warrantless arrestee, was not subject to the Federal Rules of Criminal Procedure. The source of his rights are the Illinois statute on preliminary hearings. Secondarily, his rights are secured by federal constitutional law. Garcia charged that certain defendants combined to follow a policy that was either deliberate or in conscious disregard of his constitutional rights. He alleged that after remaining in a hospital handcuffed to his bed for five days he thereafter was transferred directly to Cook County Jail. At the probable cause hearing conducted in his absence, bail was denied him. Garcia claims that the conscious or deliberate adherence by governmental officers to a policy which ignores the clear mandates of a state statute amounts to an unconstitutional abuse of power under the

Fourteenth Amendment Due Process Clause and also the Fourth Amendment, as here where such abuse resulted in a prolonged detention after a probable cause hearing which violated state law. Alternatively, but more important from the standpoint of fundamental constitutional guarantees, Garcia claims that minimum constitutional standards require the physical presence of the person arrested without warrant at any probable cause hearing hearing held within 48 hours after the arrest absent exceptional circumstances. Under either alternative view, an action for a deliberate or constructively intentional deprivation by reason of governmental policy or custom is subject to challenge under 42 USC 1983. Garcia did not allege a negligent, random or unauthorized deprivation of a protected

interest, as in Parratt v. Taylor, 451 US 527, 101 SCt 1908, 68 LEd2d 420 (1981).

The Seventh Circuit in Garcia totally ignored the Illinois statute. The court cited Gerstein and the Ninth Circuit opinion in McLaughlin to conclude that Defendants Sheahan and English could not be responsible for not producing Garcia for the Gerstein hearing because he did not have to be present. Also driving the decision were the Seventh Circuit's line of authority in Wilkins v. May, 872 F2d 190 (7th Cir 1989), cert denied, 493 US 1026, 110 SCt 7733, 107 LEd2d 752 (1990) and Villanova v. Abrams, 972 F2d 792 (7th Cir 1992) These cases hold that after a Gerstein hearing, the Fourth Amendment ceases to apply and due process furnishes the only

standard. The holding in Garcia, unless clarified, could translate into state prosecutorial practices whereby arrestees are routinely absent for their own probable cause hearing. The imprimatur of Garcia signals state officials that there is really no downside to not having the arrestee present. In this respect the 'informality' and 'sole issue' language of the Supreme Court in Gerstein is seized upon by the lower federal courts as being infused with greater content than may have been intended.

What precise constitutional provision requires the physical presence of the accused at the probable cause hearing: is it the Fourth Amendment or the Due Process Clause of the Fourteenth Amendment? Albright v. Oliver, __ US __,

114 SCt 807, 127 LEd2d 114 (1994) seems to have underscored the Fourth Amendment. True, this conclusion is inverse because Albright expressly waived reliance on the Fourth Amendment and on procedural due process and the Court narrowly held that substantive due process, on which Albright did rely, was inapplicable. Albright appears to smear the neat territorial boundryline of the rule surveyed by the Seventh Circuit in Wilkins and Villanova. Particularly so, when we consider that both these decisions predate the 'objective reasonableness' standard of Graham v. Connor, 490 US 386, 109 SCt 1865, 104 LEd2d 443 (1989). Garcia claims that his supposed Gerstein hearing is flawed by his nonappearance pursuant to governmental policy. The hearing itself was in violation of what should be part and

parcel of a guarantee from seizure secured under the Fourth Amendment. The hearing, if constitutionally improper, was a proximate cause of his entire extended detention, which Garcia expressly pleaded. Justice Ginsburg in a concurring opinion in Albright, emphasizes the "purposive and embracing" scope of the Fourth Amendment (111 SCt at 815) And the comment by Chief Justice Rehnquist in that same decision (114 SCt at 813) quoting his earlier writing in Graham v. Connor that a particular amendment's provision of an "explicit source of constitutional protection" is looked to rather than the "more generalized notion" of substantive due process seems like a signpost with an arrow on it pointing to the Fourth Amendment, at least in Garcia's case.

II. GARCIA'S CONTINUED DETENTION AFTER OBJECTIVE PROOF OF INNOCENCE IS A FOURTH AMENDMENT SEIZURE

Garcia's claims that his continued detention after the negative drug test report was made was unreasonable in duration and therefore unconstitutional. The dissent by Justice Cudahy in Garcia is adopted by Garcia as making all the relevant arguments which Garcia would make with the major exception of whether the Fourteenth Amendment is the relevant constitutional source. Based on the various analyses in Albright, it probably does not apply. Justice Powell in Gerstein wrote: "Both the standards and procedures for arrest and detention derive from the Fourth Amendment" (420 US at 111) At issue is Garcia's continuing detention after proof which makes it objectively impossible that he committed

the crime charged. As Justice Cudahy points out, citing Powe v. City of Chicago, 664 F2d 639 (7th Cir 1981); Gay v. Wall, 761 F2d 175 (4th Cir 1985); Sanders v. English, 950 F2d 1152 (5th Cir 1992) this is not a situation where Garcia charges the police authorities with failure to investigate further where facts cast doubt on the accused's innocence. Garcia was detained after the negative test which amounted to actual knowledge that it was objectively impossible for him to be guilty of the crime charged. Although Justice Cudahy views this as a due process violation, he points out, citing Graham v. Connor, that it should make no difference since the Fourth Amendment's prohibition against unreasonable seizures is coextensive with the Fourteenth Amendment's prohibitions against deprivations of

liberty without due process. Garcia's pleadings charged that his detention by reason of the drug testing delay, was done deliberately or with conscious indiffence and violated both Amendments. (R. 275-276) Garcia's situation was unlike that of Albright, who elected to proceed under substantive due process as a deliberate strategy, probably to avoid statute of limitations problems. Garcia in arguing that the Fourth Amendment is the more relevant choice, does not thereby intend to exclude the possiblity that a federal judge may fix instead on the Fourteenth Amendment. Garcia made no intentional waivers here.

III. SOME TYPE OF 'FIELD TEST' OF A SUBSTANCE THOUGHT TO BE ILLEGAL IS INDISPENASABLE TO A FINDING OF PROBABLE CAUSE

Garcia claims that some type of

reliable test should have been done at an early stage of his detention to determine whether the 'white powder' substance was illegal. Without Garcia's presence in court at the probable cause hearing, the judge decided probable cause on the basis of Officer Gall's sworn statement of a conclusory nature bereft of any facts. Garcia claims that some type of confirmatory test should have been done in the time period before the hearing, or even within a short time thereafter, in order to chemically validate the barebones conclusion with respect to what the white substance really was. Any type of a neutral, reasonably reliable test would do, perhaps even a blind taste or smell test by some person knowledgeable about dangerous drugs. Garcia pleaded the

existence of one inexpensive and easily available test. This did not mean to suggest that the police should be hogtied to only that one test.

Penninngton v. Hobson, 719 FSupp 770 (SD Ind 1989) shows the potential for police abuse of drug testing procedure. Simple aspirin was 'field tested' by police and said to be cocaine and on that basis a judge determined there was probable cause to detain Pennington pending further confirmatory tests. When the additional tests two months later found only aspirin, Pennington's later Section 1983 claim for money damages for the continued detention on the basis it violated the Fourth Amendment was upheld. Pennington affords a simple teaching. After a judge in a drug case finds probable cause based upon adequate

sworn facts, jurisdiction should be retained in that same court to allow confirmatory testing within a brief period of time. Five working days, for example. If the testing cannot be performed within the short extended time parameter, the police have an option. They can releae the detainee and rearrest him with a warrant after drug tests prove positive. Or they can detain the arrested person further on a gamble that the tests will be positive. If the gamble is lost, and the detainee, like Garcia, is innocent, the governmental authority responsible for the arrest can pay the detained person whatever damages are reasonable. Certainly the war on drugs is of paramount national importance. But it must not supply a pretextual nightstick to police to detain

persons whom the police deem undesirable when such persons turn out to be ordinary citizens innocent of the drug crime charged.

IV. THE CLAIMS AGAINST THE STATE'S ATTORNEY OF COOK COUNTY SHOULD BE REMANDED IF THIS COURT HOLDS THAT A PROBABLE CAUSE HEARING MUST INCLUDE THE APPEARANCE OF THE ACCUSED IN PERSON

Garcia claimed prospective relief and money damages from the State's Attorney. The District Court held that since Garcia was already released from jail when his action was filed, he could only be seeking retrospective monetary relief. (R. 231-232) The latter claim was dismissed on the basis that it was barred by the Eleventh Amendment. (R. 231-232) The Seventh Circuit affirmed on both points. If this Court reverses the

holding below on the Gerstein issue, then Garcia argues that the proposed Second Amended Complaint's claims against the State's Attorney should be remanded to the trial court for further consideration. And the claims against Sheahan and English should be remanded.

A. The claims for injunctive and declaratory relief

Must a plaintiff who may only be entitled to prospective injunctive relief, either individually or as a class representative, be subject to a current constitutional deprivation at the time suit is originally filed in order to sustain the class action? Some lower federal courts have held that the deprivation must subsist at the time of filing. Jones v. Takaki, 832 FSupp 1224 (ND Ill 1993)(improperly seized auto was

previously returned); and See Annotations at 33 ALR Fed 484 and 570. Garcia was subject to two years probation starting October 15, 1990 (R. 278) and the District Court dismissed the claims against Defendant O'Malley on December 23, 1991 (R. 236) So if Garcia were again arrested within the period of his probation without a warrant and subjected to the same type of Gerstein hearing outside his presence, his personal liberty would likely be threatened in the same manner as before. At the time his suit was originally commenced, however, he was no longer in custody. In his First Amended Complaint he requested only money damages from the State's Attorney. In his proposed Second Amended Complaint, leave to file it was denied, as the Seventh Circuit opinion accurate-

ly notes, on the basis that the Gerstein hearing was not unconstitutional for lack of his personal appearance, In that pleading Garcia requested not only money damages but declaratory and injunctive relief, attorneys fees and class action certification. (R 505-507) But if Garcia is unable to sue the State's Attorney for money damages on Eleventh Amendment grounds, then injunctive or declaratory relief is the remaining avenue.

In Gerstein, the Plaintiff class members filed their action while they were still incarcerated. Later they were convicted and so their pretrial detention ended. In footnote 11, the court stated that this fact "...does not moot the claims of the unnamed members of the class." Since "... other persons simi-

larly situated will be detained under the allegedly unconstitutional procedures" the claim is one that could be "capable of repetition, yet evading review." (420 US at 110) In McLaughlin the plaintiffs also sued while still incarcerated but all either received probable cause determinations or were released. The court held that obtaining class certifications after release from pretrial detention was sufficient to preserve jurisdiction. In such event the class action "relates back" to the original filing of the complaint. See, eg., Williams v. Schweiker, 541 FSupp 1360 (ED Mo 1982); Candy H. v. Redemption Ranch, Inc., 563 FSupp 505 (MD Ala 1983). The court in McLaughlin cited United States Parole Comm. v. Geraghty, 445 US 388, 100 SCt 1202, 63 LEd2d 479

(1980). The court there held that although class certification had been denied in the trial court, Geraghty, who sued while he was still incarcerated, retained a personal stake in obtaining class certification sufficient to assure that values under Article Three of the U.S. Constitution were retained. Thus if appeal results in reversal, and the class is subsequently certified, the merits of the class claim can be reached even if Geraghty's individual claim were moot.

The scope of this rule is still not clear if the lower federal courts interpret the rule as requiring the plaintiff to be subject to an unconstitutional act or omission at the time the action for injunctive relief is originally filed. Is that what the Supreme

Court intends? Garcia might be looked at as a person who, released from detention, was not entitled to maintain an equitable or declaratory action if a court determined that the threat of a similar future deprivation was not imminent. In upholding the rule against class certification mootness, McLaughlin emphasized the "inherently transitory" nature of some claims such that the trial court might not have sufficient time to rule on the claims before the proposed class representative's interest expires. (111 SCt at 1667) Surely the same volatile quality surrounds the arrestee who suddenly is thrust into the galley tier of a metropolitan prison system. The Seventh Circuit in its opinion said: (footnote 5, 24 F3d at 970) "If Garcia believed the City was

proceeding too slowly, he could have tested the substance himself by exercising his right to investigate." This idealistic comment is belied by the record: a public defender appointed without the demonstrated knowledge of Garcia and who knew Garcia was hospitalized the day after the arrest, who "had no opportunity to interview" Garcia, and who did not ask for such an opportunity during the hearing. (R. 278) Two days later in court a different public defender. (R. 281) These facts demonstrate a likelihood that Garcia had no meaningful opportunity while incarcerated to "investigate" anything, and certainly not to file suit during the 25 days he was in Cook County Jail after being transferred from the hospital. If he did not have a public defender who

would at least make an attempt to ask for a reconsideration of the probable cause finding and denial of bail contrary to the Illinois statute, he probably had no meaningful opportunity "to investigate" or do anything else during his jail time. Garcia submits that the "transitory" exception should be incrementally broadened by this court to apply to a declaratory action filed after a person arrested without a warrant is released from pretrial detention. And perhaps to injunctive relief sought as well.

B. Retrospective money damages

Will v. Michigan Department of State Police, 491 US 58, 109 SCt 2304, 105 LEd2d 45 (1989) held that the Eleventh Amendment shields a State from

Section 1983 liability for money damages where state officials were acting in their official capacity. This is true provided the damages were payable out of state funds. See also, Edelman v. Jordan, 415 US 651, 94 SCt 1347, 39 LEd2d 662 (1974); Morris v. Board of Education, 401 FSupp 188 (DC Del 1975); Seaman v. Spring Lake Park Independent School District, 387 FSupp 1168 (DC Minn 1974) Illinois law technically classifies the State's Attorney in each separate county as a state officer, at least for some purposes. Ingemunson v. Hedges, 133 Il12d 364, 549 NE2d 1269, 140 Il1Dec 397 (1990) But is any part of an award of damages against O'Malley in his official capacity actually paid by the State of Illinois? In the District Court Garcia claimed in a Memorandum of Law

that proof of the source of payment should be alleged by O'Malley as an affirmative defense, in the same manner as qualified immunity must be alleged as an affirmative defense in a a Section 1983 action. (R. 154-158) If this Court chooses to reverse on the Gerstein issue, Garcia asks that the remand include directions to the trial court to direct the State's Attorney to file an Affirmative Defense as to the source of payment of any Section 1983 money judgment against him in his official capacity. The trigger for this requirement is the prima facie proof by Garcia of unconstitutional policies and practices surrounding the probable cause hearing. Coupled with this is the lack of any clear indication in the Illinois sta-

tutes that the State of Illinois must pay all or any part of such damages.

In Santiago v. Daley, 726 FSupp 198 (ND Ill 1989) the court held that a Section 1983 action would lie against a former state's attorney for violation of the constitutional rights. The court held that Illinois law states sovereign immunity did not apply to the action against the State's Attorney in his official capacity. The basis of the decision was that the State's Attorney was a County and not a State employee. After the Illinois Supreme Court's decision in Ingemunson, the same district court reversed itself in Santiago v. Daley, 744 FSupp 845 (ND Ill 1990), based on the clear statement in Ingemunson that State's Attorneys are State officers under the language of the

Illinois Constitution. In the first Santiago opinion, the District Court observed that the countywide functions of such an official did not make such person an agent of the State. Nor did the payment by the State of two-thirds of that official's salary, any more than if the State voluntarily decided to reimburse or indemnify such an official against Section 1983 liability. (726 FSupp at 200) Montgomery v. Illinois, 21 Ill Ct Cl 205 (1952) held that a State's Attorney was not an agent of the state for purposes of vicarious liability of the state for any wrongful act by the State's Attorney. Stokes v. City of Chicago, 660 FSupp 1459 (MD Ill 1987) held that State's Attorneys were judicial officers and not county officials and that the county could not be held

responsible for the allegedly unconstitutional act of an assistant state's attorney. Illinois decisional law seems to clearly hold that a State's Attorney, as an elected county official, is the surrogate of neither the State nor the county of his election.

The Illinois system with respect to State's Attorneys is complicated. In counties of 3,000,000 or more population, the State's Attorneys office is entitled to collect fees for the work done (55 ILCS 5/4-2002.1) The State pays roughly one-third of the salary of a State's Attorney (55 ILCS 5/4-2001). The salaries of Assistant State's Attorneys are fixed by the State's Attorney, subject to budgetary limitations established by the county board and paid out of the "general corporate fund" of the

county treasury (55 ILCS 5/4-2003, 2005). There are provisions allowing for indemnification of up to $500,000 by the county of any sheriff of deputy, or any public defender or assistant public defender, for "any injury to the person or property of another" except where the injury results from "willful conduct" (55 ILCS 5/5-1002, 1003). Presumably this is beause no agency relationship exists as between the county and these particular offices. There is no statute in the State of Illinois, however, which requires either the State or County to indemnify the State's Attorney's office under similar circumstances. Cook County adopts an annual budget for the State's Attorney's office, contained in a document entitled "Cook County Illinois Board of Commissioners The Annual

Appropriation Bill for the Fiscal Year 1991" within which is contained "Fund Class 250-811." The entitlement of this fund is: "Contingent expenses for the State's Attorney for use of the State's Attorney (in addition to expenses otherwise provided for) The State's Attorney shall render a final account to the County Board and return any surplus remaining in his hands to the County Treasurer---excluding personal allowances.....$300,0000" (page 314 of Appropriations Bill). Thus any judgment against a State's Attorney of Cook County in his official capacity under Section 1983 is most likely paid out of this fund. At this time, the actual source of payment for such a judgment is a question of fact, until such time as counsel for the State's Attorney admits

that the State is not the source of any such payment.

Imbler v. Pachtman, 424 US 409, 96 SCt 984, 47 LEd2d 128 (1976) held that a state prosecutor, acting within the scope of his duties in initiating and prosecuting a criminal case, was absolutely immune from liability for damages under Section 1983. In that case, plaintiff's only claim was that the prosecuting attorney knowingly or negligently used false evidence and suppressed material evidence at the criminal trial. The Supreme Court however, noted that it was leaving open the question whether similar reasons require immunity for those aspects of a prosecutor's responsibility which cast such person in the role of an administrator or investigative officer rather than the

quasi-judicial role of advocate. Garcia claims that the alleged unconstitutional policy of the State's Attorney's office, although it had an immediate impact on the criminal prosecution of Garcia, was basically an administrative policy which is essentially quite different from the prosecutorial misconduct immunized in Imbler. GARCIA submits that the deliberate adoption of or conscious adherence to a policy which does not consist with the U. S. Constitution should not be immunized under the Imbler rule.

In summary, this appeal presents unusual questions regarding the extent to which a State's Attorney is subject to any kind of action by a person in Garcia's position. It is submitted, however, that the Supreme Court should not reach the issue of whether O'Malley

has immunity from a suit for money damages. This aspect of the case should be remanded to the trial court for a finding of fact with respect to the source of funds for payment of any judgment against O'Malley in his official capacity. In this respect, the question of O'Malley's immunity is not yet ripe for decision.

CONCLUSION

Garcia asks that this Court reverse the holdings below that (1) a probable cause hearing does not require the personal appearance of the warrantless arrestee; (2) Garcia's continued detention after objective proof of innocence constitutes a seizure; and (3) the lack of any confirmatory chemical test soon after the arrest, and within a short

time after the probable cause hearing is indispensable to a valid finding of probable cause. If the Court reverses on the first point, then the Court is requested to remand the claims against the State's Attorney with directions that the District Court direct the State's Attorney to file an affirmative defense alleging the source of payment of any potential money judgment against him, and further, to remand with directions to allow the filing of the claims against O'Malley, Sheahan and English embodied in the Second Amended Complaint. If the Court reverses on either point 2 or 3 above, remand is requested to include directions to reinstate the

appropriate Counts of the Third Amended Complaint against the City of Chicago.

Respectfully submitted,

JOHN BERNARD CASHION
Attorney for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 92-4090

RAFAEL GARCIA,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, ILLINOIS, ANNA GALL, COUNTY OF COOK, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 5535—**William T. Hart,** *Judge.*

ARGUED NOVEMBER 2, 1993—DECIDED MAY 19, 1994

Before WOOD, JR., CUDAHY, and MANION, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* On March 15, 1991, Chicago Police Officer Anna Gall arrested Rafael Garcia, who at the time was on probation for two felonies and had an outstanding bond forfeiture warrant, for possession of a controlled substance. Officer Gall had discovered by Garcia's feet a plastic bag containing a white, powdery substance, but did not test the substance before making the arrest. In the process of arresting Garcia, Gall struck him in the head with her flashlight,[1] and the police took Gar-

[1] Garcia settled for $25,000 a claim against Gall based on her use of excessive force, and that claim is not at issue in this appeal.

cia to St. Mary of Nazareth Hospital for treatment of his injuries. The next day a hearing took place in the Circuit Court of Cook County (the *Gerstein* hearing)[2] to determine whether probable cause existed to detain Garcia.

At that time, Garcia remained hospitalized under twenty-four hour guard and therefore was unable to attend the *Gerstein* hearing.[3] Instead, a Public Defender represented Garcia at the hearing and asked for reasonable bond on his behalf. The prosecutor petitioned the court to issue a warrant and set bail for Garcia's violation of probation. The court found probable cause to detain Garcia, and set his bond for violating probation and possessing a controlled substance.

On March 18, while Garcia remained hospitalized, the court set a preliminary hearing for April 10. St. Mary of Nazareth Hospital released Garcia on March 20, and personnel from the Sheriff's office immediately placed Garcia, who did not make bond, in custody at the Cook County Jail. On March 26, the Chicago Police Department laboratory tested the powder and found it to be negative for any controlled substances. The laboratory communicated that information to the State's Attorney's office, and at the preliminary hearing on April 10, Judge Mary Maxwell Thomas granted the prosecutor's request for a *nolle prosequi*. On April 12, the court reinstated Garcia's probation status. Cook County Jail released Garcia on April 15.

Garcia then filed this lawsuit for money damages in the District Court for the Northern District of Illinois. Garcia's first amended complaint named as defendants Officer Gall, the City of Chicago, the Cook County Department

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[2] *Gerstein v. Pugh* held that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention," 420 U.S. 103, 126 (1975), and probable cause hearings that take place after arrests made without warrants commonly are referred to as *Gerstein* hearings.

[3] Garcia spent approximately five days in the hospital.

of Corrections, Director of the Cook County Department of Corrections C. Richard English, Cook County State's Attorney Jack O'Malley, and Cook County Sheriff Michael F. Sheahan. Garcia claimed that: (1) the *Gerstein* hearing was inadequate because he was not brought before the judge, due to his hospitalization; (2) Gall used excessive force against him and did not have probable cause to arrest him; (3) O'Malley, Sheahan, and English were responsible for detaining him without probable cause; and (4) the City of Chicago's procedures for testing substances seized as narcotics were constitutionally inadequate. All defendants filed dispositive motions in response to Garcia's complaint.

The district court dismissed State's Attorney O'Malley and the Cook County Department of Corrections based on Eleventh Amendment immunity from civil liability, and dismissed all of Garcia's *Gerstein* claims; the court did not dismiss Sheriff Sheahan and Director English because that issue was not before the court. Garcia then filed a motion to reconsider, as well as a motion to file a second amended complaint that in essence repeated the *Gerstein* claims from the first amended complaint. Sheahan and English filed a motion for summary judgment. The district court denied both of Garcia's motions, and dismissed Sheahan and English.

Garcia then filed a motion to file a third amended complaint, which included new claims against the City of Chicago and Officer Gall, but included none of the other defendants. The district court granted the motion, and the City of Chicago and Gall moved to dismiss counts three through six of the complaint, which the district court granted. Counts I and II, for excessive force and false arrest, named only Gall as the defendant. Gall and Garcia settled those claims for $25,000, and Garcia reserved the right to appeal earlier rulings of the district court. Garcia now appeals from the dismissals of O'Malley, Sheahan, and English, the denial of leave to file his second amended complaint, and the dismissals of the fifth and sixth counts of his third amended complaint, which alleged

that the City's procedures for testing substances to determine if they are controlled were constitutionally deficient.

A. Defendant O'Malley

The Eleventh Amendment prohibits federal courts from deciding suits brought by private litigants against states or their agencies, and that prohibition extends to state officials acting in their official capacities. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Whether a particular official is the legal equivalent of the State itself is a question of that State's law, *Santiago v. Daley*, 744 F. Supp. 845, 845 & n.1 (N.D. Ill. 1990), and the Illinois Supreme Court decided in 1990 that State's Attorneys are state officials. *Ingemunson v. Hedges*, 549 N.E.2d 1269, 1272 (Ill. 1990) (State's Attorneys are state, not county, officials); *see also Scott v. O'Grady*, 975 F.2d 366, 371 (7th Cir. 1992) (those who prosecute cases ~~pursuant~~ to state statute are state officials for the purposes of constitutional liability); *Santiago*, 744 F. Supp. at 845-46. Because O'Malley was acting in his official capacity as Cook County State's Attorney, Garcia cannot recover money damages from him.

Garcia does argue that he is entitled to injunctive relief from O'Malley, and the Eleventh Amendment provides no shield against such requests. *Will*, 491 U.S. at 71. When Garcia requested injunctive relief in his second amended complaint, however, Cook County jail had already released him from their custody, and Garcia alleged no facts to show that he was in danger of being arrested in the future and detained in a similar manner. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (no standing to seek injunction if not in danger of being arrested and subjected to future mistreatment). Thus, the district court correctly dismissed O'Malley.

B. The *Gerstein* Claims

Garcia's only claims for relief against defendants Sheahan and English relate to his inability to be present at

the probable cause hearing held the day after Officer Gall arrested him. Garcia also named the City of Chicago and Cook County in those claims.[4] The Fourth Amendment, however, does not require that probable cause hearings be adversarial in nature, *Gerstein v. Pugh*, 420 U.S. 103, 121-22 (1975); the Fourth Amendment allows the issuance of warrants in the absence of the arrestees, and its scope does not expand for probable cause determinations that take place after arrests. *Id.* at 120; *see also McLaughlin v. County of Riverside*, 888 F.2d 1276 (9th Cir. 1989) ("Those arrested with a warrant have not attended the probable cause determination made before issuance of the warrant. We perceive no basis for holding that the fourth amendment grants warrantless arrestees such a right."). The record in this case demonstrates that Garcia, who never contended that he was physically capable of leaving the hospital, received a timely and constitutionally sufficient probable cause hearing in which an attorney represented Garcia without objection by Garcia. The district court therefore correctly dismissed the City of Chicago, Cook County, Sheahan, and English notwithstanding Garcia's inability to attend the hearing.

C. The Second Amended Complaint

We must ask whether the district court abused its discretion when it denied Garcia leave to amend his complaint. *See Bower v. Jones*, 978 F.2d 1004, 1008 (7th Cir.

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[4] Garcia failed to specify in his notice of appeal that he was appealing the dismissal of the *Gerstein* claims against the City of Chicago as Federal Rule of Appellate Procedure 3(c) requires. That failure is jurisdictional, *see Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), and we therefore cannot consider the appeal of the *Gerstein* claims as applied to the City of Chicago. Additionally, Garcia expressly waived his right to raise any *Gerstein* claims against the City in his settlement agreement with Officer Gall and the City. The importance of these points, however, is minimized by the fact that, as the district court explained, Garcia's *Gerstein* claims lacked any merit.

1992). A district court does not abuse its discretion in denying leave to amend if the proposed repleading would be futile, *DeSalle v. Wright*, 969 F.2d 273, 278 (7th Cir. 1992), and futile repleadings include restating the same facts using different language, *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1244 (7th Cir. 1983), reasserting claims previously determined, *id.*, failing to state a valid theory of liability, *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979), and the inability to survive a motion to dismiss, *Glick v. Koenig*, 766 F.2d 265, 268 (7th Cir. 1985).

Garcia's second amended complaint reiterated his excessive force and Fourth Amendment claims against the City of Chicago and Officer Gall, and restated the *Gerstein* claims the district court had dismissed previously. The district court reasoned that because the second amended complaint stated no new claims, it was futile, and the district court therefore denied Garcia leave to amend his complaint. That decision, far from being an abuse of discretion, stood on firm legal ground.

D. The Fourth and Fourteenth Amendment Claims

Garcia argues that the Fourth Amendment requires that police officers perform tests on substances believed to be illegal drugs immediately at a police station, rather than ten to twenty days after arrests at a crime lab, as the City of Chicago did after Garcia's arrest. Nevertheless, Garcia concedes that finding a white powder in a person's possession provides probable cause to arrest that person for possession of cocaine. *See United States v. Potter*, 895 F.2d 1231, 1234 & n.1 (9th Cir), *cert. denied*, 497 U.S. 1008 (1990). As we consistently have held, "once police officers have discovered sufficient facts to establish probable cause, they have no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence." *Schertz v. Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989).

Garcia has suggested that the cobalt thiocyanate spot test is a superior, quicker means of determining whether a substance is cocaine. Perhaps he is correct, but what is wise practice and what is constitutionally compulsory are two very different concepts. *See Gramenos v. Jewel Cos.*, 797 F.2d 432, 442 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987). The City of Chicago is entitled to weigh the costs and benefits of available testing options and make its choice, and federal courts should be reluctant to second-guess such policy decisions. Garcia has articulated no reason why a twenty day period of time for testing a substance believed upon probable cause to be cocaine is constitutionally deficient, nor can we fathom why it would be.[5]

Garcia also contends that the City held him in custody in violation of the Fourth and Fourteenth Amendments after it discovered that the powder in question was not a controlled substance.[6] Garcia, however, was on probation before his arrest by Officer Gall, his probation was revoked subsequent to the arrest. The City legitimately held Garcia in custody until April 12, when the court reinstated Garcia's probation. *See Thompson v. Duke*, 882

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[5] If Garcia believed the City was proceeding too slowly, he could have tested the substance himself by exercising his right to investigate. *See U.S. Const.* amend VI (Compulsory Process Clause); Ill. S. Ct. R. 412(a)(v).

[6] Because the seizure of a person ends after the *Gerstein* hearing, the Due Process Clause of the Fourteenth Amendment is the only applicable constitutional provision. *See Wilkins v. May*, 872 F.2d 190, 193 (7th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990). The recent Supreme Court decision of *Albright v. Oliver*, 114 S. Ct. 807 (1994), casts considerable doubt on the applicability of substantive due process as well. *See id.* at 814 (Scalia, J., concurring) ("But here there was no criminal sentence (the indictment was dismissed), and so the only deprivation of life, liberty or property, if any, consisted of petitioner's pretrial arrest. I think it unlikely that the procedures constitutionally "due," with regard to an arrest, consist of anything more than what the Fourth Amendment specifies.").

F.2d 1180, 1187 (7th Cir. 1989) ("We note that dismissal of the charges underlying a parole violation warrant has been found of no consequence in the state's determination of a parole violation.") (citations omitted). Although undue delay in making a decision regarding reinstatement of probation might in some instances rise to the level of a deprivation of constitutionally guaranteed rights, *United States v. Scott*, 850 F.2d 316, 319 (7th Cir. 1988),[7] Garcia did not make any arguments regarding reinstatement of his probation.

Instead, Garcia cites *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986), *Davis v. Kirby*, 755 F. Supp. 199, 201 (N.D. Ill. 1990), and *People v. Quarles*, 410 N.E.2d 497 (Ill. App. Ct. 1980), for the proposition that the City was constitutionally obligated to release him as soon as it discovered that Garcia was not in possession of a controlled substance, but none of those cases hold as Garcia indicates. *BeVier*, *Davis*, and *Quarles* all involved the dissipation of probable cause *before* a judicial determination of probable cause (and in *BeVier* and *Davis*, probable cause never existed at all). Once a judge makes a probable cause determination at a *Gerstein* hearing, as happened here, that determination is sufficient to bring the case to trial. *Gerstein*, 420 U.S. at 119-24.

What happens when the prosecutor discovers exculpatory evidence after a probable cause determination at a *Gerstein* hearing? Not all exculpatory evidence irrefutably

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[7] In *Scott*, this court adopted a three factor test to determine whether a revocation hearing was not reasonably prompt: "the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Scott*, 850 F.2d at 319, quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Here, Garcia was not prejudiced by the delay, as his probation was reinstated in less than three weeks. *See Scott*, 850 F.2d at 321 (13 month delay not prejudicial when no evidence of how delay impaired defense at revocation hearing exists). Additionally, Garcia never asserted his right to a reasonably prompt revocation hearing. Our holding that Garcia properly was held in custody until after the preliminary hearing is well within *Scott*.

proves the defendant's innocence. The decision to move for *nolle prosequi* is a matter of prosecutorial discretion, and the prosecutor can proceed to trial if the prosecutor believes doing so is warranted. In this case, in fact, the prosecutor *did* dismiss the case well before trial, at the preliminary hearing—Garcia just contends that the delay from March 26 until April 10, the date the court set for his preliminary hearing, was too lengthy. The Due Process Clause, however, does not compel prosecutors to dismiss its cases before trial based on exculpatory evidence in its possession, much less compel them to do so within fifteen days. *See Albright v. Oliver*, 114 S. Ct. 807, 813 (1994) (quoting *Gerstein* for the proposition that the accused is not "entitled to judicial oversight or review of the decision to prosecute.").

Of course, if the prosecutor fails to deliver exculpatory evidence to the defendant before trial, it may run afoul of *Brady v. Maryland*, 373 U.S. 83 (1963). If the trial is too long in coming, a Sixth Amendment speedy trial problem may arise. *See Doggett v. United States*, 112 S. Ct. 2686, 2692-94 (1992). Garcia, however, raises neither a *Brady* nor a Speedy Trial claim (nor do either problems exist here). The prosecutor, confronted with strong exculpatory evidence, properly decided to move for a *nolle prosequi* at the preliminary hearing rather than wait until trial. Garcia's right to due process of law was satisfied.[8]

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[8] We are somewhat puzzled as to why Garcia was not released until April 15, 1991, given that the prosecutor entered a *nolle prosequi* on April 10, and that Garcia's probation was reinstated on April 12. Perhaps this was due in part to the weekend that fell on April 13-14, 1991, or to administrative inefficiencies. Obviously, holding a person in jail for several days who does not belong there might rise to the level of a constitutional violation. Nevertheless, nothing in the record suggests that Garcia's attorney ever brought Garcia's continued confinement to the attention of the court, nor is there any indication that Garcia himself ever made an effort to contact the court, his attorney, or an administrator in the Cook County Jail.

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part.

I agree with the majority's able analysis and disposition of all the issues save one. I have difficulty, however, with the approach to the City's delayed drug testing and egregiously slow application of the negative test results. Garcia alleges that the City's policy caused him to be detained for the 11 days it took the white powder to be tested for drugs, and for 15 more days after the tests came back negative. Because I think that such a policy may implicate Garcia's Fourteenth Amendment due process rights, I would not dismiss this claim at the early stage of a 12(b)(6) motion. Whether the City policy actually caused Garcia's detention and whether it is reasonable are issues requiring further proceedings. The waters are muddied somewhat by the fact that Garcia was on probation for an auto theft offense at the time of his arrest. At the *Gerstein* hearing, the state's attorney was granted leave to file a violation of probation report, although, contrary to the majority's assumption, Garcia's probation was never actually revoked.[1] But neither the parties, the district court nor the majority have scrutinized this case through the probation lens. Significantly, the City never contended that Garcia's detention was based on his alleged probation violation, nor does it argue that either his liberty interest or his due process rights are limited due to his probation status. Nor does the majority's analysis hinge on Garcia's status as a probationer. Because the case has proceeded along these lines, I find it useful to

[1] Probation may be revoked only after a full hearing that includes notice of the alleged violation, an opportunity to appear and present evidence, a conditional right to confront adverse witnesses and a written report. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *see also* 730 ILCS 5/5-6-4 (revocation hearing must occur within a reasonable time). There is no evidence that Garcia received such a hearing. At the April 12 hearing after the prosecutors nolle prossed the charges against Garcia, the court restored (as opposed to reinstated) probation, noting that it had never been terminated.

examine first Garcia's detention claim without reference to his probation status.

It is significant that the district court did not dismiss Garcia's due process claim for failure to allege a constitutional violation. Instead, the court found that "conduct that results in unreasonable, unnecessary and unjustified delays in processing and releasing arrestees violates the Constitution if done intentionally or with deliberate indifference to the rights of arrestees." And the district court concluded that for purposes of a motion to dismiss, it must be presumed that 10 to 20 days is an unreasonable testing delay. But the court eventually dismissed the claim for failing to allege municipal liability with heightened specificity, an approach since invalidated by *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160 (1993). I believe, however, that the district court was correct in its analysis of the problem—preliminary to its consideration of the pleading question.

Garcia's objection to the City's policy is essentially a challenge to extended pre-trial detention. The majority reasons that after a *Gerstein* hearing the speedy trial guarantee is the only limitation on subsequent prolonged pre-trial detention. This is cold comfort—the Constitution permits a trial months or even years after an arrest. *See, e.g., Barker v. Wingo*, 407 U.S. 514, 536 (1972) (delay of over four years is constitutional). Moreover, I am skeptical about the majority's implicit conclusion that a *Gerstein* hearing bestows a constitutional blessing on *all* subsequent prolonged detention.

In *Baker v. McCollan*, 443 U.S. 137 (1979), the Supreme Court suggested that prolonged pre-trial detention, pursuant to a valid warrant and a judicial determination of probable cause, may violate due process. *Id.* at 145. *Baker* found no constitutional violation where the plaintiff was arrested and detained for three days over a holiday before the authorities realized they had arrested the wrong man. Although the speedy trial guarantee ensured that someone could not be detained indefinitely, the Court observed that

continued detention "in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law." *Id.* However, the Court was "quite sure that a detention of three days over a New Year's weekend does not and could not amount to such a deprivation." *Id.*

On the other hand, *Baker* also rejected a requirement that law enforcement officials exercise "due diligence" to determine whether the person detained is in fact innocent, holding that officials need not "investigate independently every claim of innocence." 443 U.S. at 146; *see also Thompson v. Duke*, 882 F.2d 1180, 1186 (7th Cir. 1989), *cert. denied* 495 U.S. 929 (1990); *Schertz v. Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989). The government here, of course, argues that *Baker* forecloses any challenge to the City's policy of delayed drug testing or of delayed reaction to the results of the drug tests.

But *Baker*, by its own admission, is not absolute. Since *Baker*, courts have found that prolonged pre-trial detention without any investigation can constitute a deprivation of liberty without due process. In *Johnson v. City of Chicago*, 711 F. Supp. 1465 (N.D. Ill. 1989), for example, the court found that a 6-day detention violated due process when the police did not take "even minimal steps" to evaluate the detainee's claims of innocence. *Id.* at 1470. Significantly, Johnson was arrested pursuant to a valid warrant (unfortunately intended for another Johnson, an Attica escapee) and brought before a judge for a first appearance; nonetheless, the court found that due process required more. *Id.* Similarly, in *Patton v. Przybylski*, 822 F.2d 697 (7th Cir. 1987), "an innocent person was allowed to languish in jail for almost a week; and to arrest a person over his vigorous protest that he is the wrong man . . . and keep him in jail for this period without either investigating the case or bringing him before a magistrate raises serious constitutional questions, under the . . . due process clause." *Id.* at 700-01. In *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985), where the plaintiff was detained

pursuant to a valid warrant for 18 days despite his protests of innocence, we held that "*Baker* supports, if not requires, our conclusion that plaintiff's 18-day detention was a violation of liberty without due process of law." *Id.* at 724. *See also Brown v. Patterson*, 823 F.2d 167, 169 (7th Cir.), *cert. denied* 484 U.S. 855 (1987) ("prolonged confinement of an arrested person without a hearing to determine whether he is the person named in the warrant would be a deprivation of liberty without due process of law and thus violate the Fourteenth Amendment").[2]

Baker does not, then, preclude us from finding that the constitutionality of pre-trial detention may be questioned if the authorities deliberately ignore *all* indications that

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[2] These cases all rely, to some degree, on the fact that the detainees were not brought before a magistrate to present their claims of innocence. But although Garcia received a *Gerstein* hearing, it is by no means clear that this alone renders these cases inapplicable. A *Gerstein* hearing *follows* a warrantless arrest, and essentially replaces the probable cause determination that otherwise precedes issuance of an arrest warrant, *Gerstein*, 420 U.S. at 120; hence adversary safeguards, such as the right to be present at the hearing, are absent. *McLaughlin v. County of Riverside*, 888 F.2d 1276, 1279 (9th Cir. 1989), *vacated and remanded on other grounds*, 500 U.S. 44 (1991). But all defendants, whether arrested pursuant to a warrant or not, are usually afforded an opportunity under state law (e.g. 725 ILCS 5/109-1) or under Fed. R. Crim. P. 5(a) to be presented to a magistrate soon after arrest. Since the defendants in *Coleman* and *Patton* were arrested pursuant to warrants, it is, in part, the absence of this "first appearance" that rendered their detention unconstitutional. *Coleman*, 754 F.2d at 723-24; *Patton*, 822 F.2d at 701. But I am skeptical whether the *Coleman* or *Patton* courts would have considered due process satisfied if the defendants in those cases had not themselves been brought to court nor been represented by counsel who knew about their claim of mistake. The results might have been different if a judge had only read the police affidavits and ruled that the defendants could remain in detention. The latter is, essentially, the process that Garcia received. While this process comports with the requirements of *Gerstein*, it is far from clear that it is the equivalent of the hearing we have required as a prerequisite to extended pre-trial detention in *Coleman* or *Patton*.

the detainee is innocent. We should not, therefore, hold as a matter of law that the City's failure to determine whether a suspect was carrying *any* drugs for 11 days cannot implicate due process.

But whatever haziness obscures the exact contours of a duty to investigate burns off once the authorities *know* that they have no basis for detention. *Baker* only permitted pre-trial detention after a valid arrest pursuant to a valid warrant "*until* it was discovered that [the detainee] was not the person sought." *Powe v. City of Chicago*, 664 F.2d 639, 651-52 (7th Cir. 1981) (emphasis in original). *Baker* and its progeny did not involve "actual knowledge of the defendant's innocence, but rather the failure to take affirmative steps to determine his innocence." *Gay v. Wall*, 761 F.2d 175, 178 (4th Cir. 1985); *see also Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992). Here, after March 26, the City had tested the white powder and knew that it contained no drugs. Absent *any* other basis for suspicion—and at this stage we must assume there was none other than probation violation concerns—Garcia's extended detention at least presumptively violates the due process clause. *See e.g. Powe*, 664 F.2d at 651-52; *Gay v. Wall*, 761 F.2d at 179; *Pennington v. Hobson*, 719 F. Supp. 760 (S.D. Ind. 1989). As far as we can tell, the balance of incriminating evidence did not merely shift; there simply was no incriminating evidence. The situation was exactly as if the authorities had found that they had arrested the wrong person. *See, e.g., Patton*, 822 F.2d at 700-01; *Powe*, 664 F.2d at 651. In those circumstances—when the law enforcement officers know there is *no* hint of wrongdoing—continued pre-trial detention cannot be justified.

Richmond, Indiana had a drug testing policy that resulted in a similar prolonged detention that the district court found unconstitutional in *Pennington v. Hobson*, 719 F. Supp. at 770-72. Pennington was found with a packet of white powder, which a field test indicated was cocaine. A state court determined there was probable cause to detain Pennington pending confirmation of the field test.

Confirmation took two months since the police officer responsible for transporting drugs to the state lab took only one trip each month and had just returned from that month's trip. The white powder turned out to be aspirin after all, but Pennington was kept in jail for another month after the test results came back. *Id.* at 763-64. Like Garcia, Pennington brought a § 1983 claim alleging that the testing policy resulted in an unlawful detention. The district court concluded that although the police were not required to confirm their positive field test sooner than they did, the continued detention after the tests proved negative violated the Fourteenth Amendment. *Id.* at 771. The court denied the police officers' claim of qualified immunity, finding that "reasonable police officers [were] on notice that the Constitution proscribed intentional deprivations of liberty in the face of clearly exculpatory evidence." *Id.*

The Fifth Circuit also recently concluded that detention without investigation could be unconstitutional. *Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992). Sanders was arrested pursuant to a valid warrant and detained for about 50 days. The police officer did not follow up on the significant leads suggesting that he was innocent. *Id.* at 1156-57. The Fifth Circuit held that Sanders' § 1983 claim alleging a due process violation survived dismissal since "a fact-finder reasonably could conclude that Lt. McCoy deliberately looked the other way in the face of exonerative evidence indicating that he had arrested the wrong man. . . . *Baker* imposes no impediment to Sanders' claim because the thrust of his contention is not that Lt. McCoy failed to take affirmative steps to investigate Sanders' innocence, but rather, that Lt. McCoy failed to release him even after he knew (or should have known) that Sanders had been misidentified." *Id.* at 1162.

In the Fourth Amendment context, if the evidence that forms probable cause for a warrantless arrest dissipates before the arrestee is brought before a judge, continued detention is unconstitutional. *Sivard v. Pulaski County*, 959 F.2d 662 (7th Cir. 1992), *remanded and affirmed on*

other grounds, 17 F.3d 185 (7th Cir. 1994), held that a plaintiff had stated a due process claim when the "sheriff . . . knew of his wrongful detention and continued to detain him in spite of that knowledge." *Id.* at 668. The same principle should apply in the due process context when the *sole basis* for detention has evaporated. Of course, it remains to be seen in the course of developing the facts to what extent the City's policy contributed to Garcia's continued detention. But since his detention presumptively violated his due process rights, I would not dismiss the matter at this stage.

Garcia has also challenged the City's policy as objectively unreasonable under the Fourth Amendment. As the majority noted, this circuit has a line of cases stating that after a Gerstein hearing, the Fourth Amendment ceases to apply and due process furnishes the only standard. *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990); *Villanova v. Abrams*, 972 F.2d 792, 797 (7th Cir. 1992). Although I agree that these cases preclude consideration of Garcia's Fourth Amendment claim, the Supreme Court's recent decision in *Albright v. Oliver*, 114 S. Ct. 807 (1994), potentially blurs the bright line we have drawn. Albright was arrested for selling look-alike drugs. He was bound over for trial at a preliminary hearing (although not imprisoned), and the charges against him were eventually dismissed. *Id.* at 810. The Court was presented with the narrow question whether Albright could maintain a § 1983 claim for malicious prosecution on substantive due process grounds. *Id.* at 812. A plurality of the court held that there is no substantive due process right to be free from malicious prosecution. Rather, any such claim should be brought under the Fourth Amendment (although the court noted that Albright had not challenged his treatment on procedural due process grounds either). *Id.* Justice Ginsburg, who joined the plurality, wrote separately to explain her reasons for considering the case under the Fourth Amendment: "Albright may have feared that courts would narrowly define the Fourth Amendment's key term 'seizure' so as to deny full scope

to his claim. In particular, he may have anticipated a holding that the 'seizure' of his person ended when he was released from custody on bond. . . . Such a concern might have stemmed from Seventh Circuit precedent set before *Graham v. Connor*, 490 U.S. 386 (1989). *See Wilkins v. May*, 872 F.2d 190, 195 (1989) (substantive due process 'shock the conscience' standard, not the Fourth Amendment, applies to brutal 'post-arrest pre-charge' interrogation)." *Id.* at 815 & n.2. The Ginsburg opinion further observes that the Fourth Amendment continues to apply even after an initial bond hearing and release on custody, since the defendant remains " 'seized' for trial, so long as he is bound to appear in court and answer the state's charges." *Id.* at 816.

Since, however, the Court's statements about the applicability of the Fourth Amendment are essentially only dicta in an otherwise narrow substantive due process case, I have difficulty concluding that they revive Garcia's Fourth Amendment claim. In any event, it probably makes little difference here, since the Fourth Amendment's prohibition against "unreasonable" seizures is co-extensive with the Fourteenth Amendment's prohibition against deprivations of liberty without due process. *Id.* at 829, n.24 (Blackmun, J., dissenting).

No party has suggested that Garcia's claim with respect to pre-trial detention has been affected by his status as a probationer. Nor did the district court consider this germane to the issues presented here. I therefore do not think the issue is properly before us. Even if it were, I do not think that Garcia's probation status would significantly affect the analysis of this case. Once the essential basis for probation revocation—a probation violation—had disappeared, there was no justification for denying even a probationer's minimal liberty interest.[3] *See, e.g., Douglas*

[3] Of course, a probation violation may exist where no crime has been committed. *See, e.g., Thompson v. Duke*, 882 F.2d at 1187 (three day delay in conducting parole revocation hearing was con-

(Footnote continued on following page)

v. Buder, 412 U.S. 430, 432 (1973) ("we conclude that the finding that petitioner had violated the conditions of his probation . . . was so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment"); *Gagnon v. Scarpelli*, 411 U.S. at 781-82 (due process applies to probation revocation).

On a final note, the majority observes that Garcia was detained for an additional five days after the charges against him were nolle prossed, or three days after probation had been restored. Inexplicably, Garcia does not appear to challenge this period of detention. I mention this fact only to underscore my view that such arbitrary detention—when a person is neither suspected, arrested, charged nor convicted of any crime or wrongdoing—is clearly unconstitutional.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[3] *continued*
stitutional when there were reasons to suspect parole had been violated). We do not know, again in great part because the probation revocation question has never been presented in this case, whether after the drug testing there remained any basis on which to conclude that Garcia had violated a condition of his probation. We also do not have the benefit of the district court's consideration of the factors set forth in *United States v. Scott*, 850 F.2d 316, 319 (7th Cir. 1988).

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 15, 1994

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

No. 92-4090)

RAFAEL GARCIA,
Plaintiff-Appellant,

v.

CITY OF CHICAGO, ILLINOIS, ANNA GALL, COUNTY OF COOK, et al.
Defendants-Appellees.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant on June 6, 1994, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing en banc be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
NOV 14 1994
OFFICE OF THE CLERK

No. 94-870

In The

Supreme Court of the United States

October Term, 1994

RAFAEL GARCIA,

Petitioner,

v.

CITY OF CHICAGO; JACK O'MALLEY, STATE'S ATTORNEY OF COOK COUNTY; MICHAEL F. SHEAHAN, SHERIFF OF COOK COUNTY; and C. RICHARD ENGLISH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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23 pp

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAFAEL GARCIA,	)	
Plaintiff,	)	
v.	)	No. 91 C 5535
CITY OF CHICAGO, et. al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Rafael Garcia alleges that excessive force was used in arresting him. He further alleges that he was held in custody for approximately one month without being brought before a judge or magistrate for a probable cause hearing. Named as defendants are the City of Chicago; Chicago police officer Anna Gall; the Cook County State's Attorney Jack O'Malley; the Cook County Sheriff Michael Sheahan; the Cook County Department of Corrections; and then-acting Executive Director of Cook County Jail C. Richard English. O'Malley and the Department of Corrections have moved to dismiss the claims against him. The City and Gall have moved to dismiss certain of the claims made against them.

On a motion to dismiss, all the well-pleaded allegations of the complaint are assumed to be true and all reasonable inferences from the facts alleged are drawn in favor of plaintiff. *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1039 (7th Cir. 1987). Facts that can be taken by judicial notice can also be considered. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir.

1986); C.A. Wright & A. Miller, *Federal Practice & Procedure* § 1363 at 464-65 (2d ed. 1990). *See also Gomez*, 811 F.2d at 1039 (*dictum*); *Robinson v. McMahon*, 1990 WL 17174 at *2 (N.D. Ill. Oct. 31, 1990) (*dictum*). To the extent the judicially noticed facts contradict allegations of the complaint, the allegations will not be accepted as true. Wright & Miller, § 1363 at 464. Also, judicial notice can be taken of public records without converting a motion to dismiss to one for summary judgment. *Mack*, 798 F.2d at 1282.

Here, defendants provide a copy of the court records which they contend show that a hearing was held on March 16, 1991, the day after plaintiff's arrest, at which it was determined that there was probable cause to detain plaintiff. Plaintiff's attorney also provides an affidavit in which he represents that true copies of official court documents are attached. Plaintiff does not dispute that the entry for March 16 ("FPCTD D 10,000 BR. 57 3/18/91") means "finding probable cause to detain" with bond set at $10,000 and a hearing set for March 18 in Branch 57 of the court. Accepting this as true would only supplement the allegations of the complaint, not contradict the allegations. In the First Amended Complaint, plaintiff is careful to allege that plaintiff himself was never brought before a judge nor present in court when any charges were presented. While he does not expressly allege that a hearing was held without him present, he also does not expressly allege that no hearing whatsoever was held.[1] This court will take judicial notice that a court

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[1] Defendants seek sanctions pursuant to Fed. R. Civ. P. 11 on the ground that plaintiff's attorney should have examined

finding of probable cause was entered. No notice is taken as to what, if any, type of hearing was held in that the court documents provided do not indicate the nature or extend of any hearing.

Defendant Cook County Department of Corrections argues that it does not have any separate legal existence independent and distinct from the Sheriff of Cook County. *See Mayes v. Elrod*, 470 F. Supp. 1188, 1192 (N.D. Ill. 1979). *See also Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2167 (1990). Plaintiff makes no argument to the contrary. The Sheriff in his official capacity will be substituted for the Department as a defendant in counts 6 and 8. The Department will be dismissed from Count 11 in that the Sheriff is already a named defendant in that count.

The Cook County State's Attorney is named as a defendant in counts 9 and 11. Since O'Malley's title is mentioned each time he is named and since no personal knowledge or involvement on his part is alleged, the complaint is construed as being against O'Malley in his official capacity only. Since plaintiff has already been released from jail, plaintiff can only be seeking retrospective monetary relief. The State's Attorney, however, is a state official not a local official. Thus, plaintiff's claims against the State's Attorney brought in this court are barred by the Eleventh Amendment. *Houston v. Cook County*, 758 F. Supp. 1225 (N.D. Ill. 1990); *Taylor v. Partee*,

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the state court file to discover that a hearing had been held. However, since it is not alleged in the First Amended Complaint that no hearing was held, this is not a basis for sanctioning the attorney.

1991 WL 136015 at *2 (N.D. Ill. July 17, 1991). The claims against O'Malley will be dismissed.

Anna Gall is named as a defendant in counts 1, 3, 4 and 5. The City of Chicago is named as a defendant in counts 3, 4, 5, 7 and 11. These defendants move to dismiss all the claims against them except the Count 3 state law assault and battery claims.

Count 1 contains all of plaintiff's general allegations that are subsequently reincorporated into the other counts. As to Gall, however, it is only alleged that she arrested plaintiff will acting under color of law and that her striking him "with her flashlight while the Plaintiff was handcuffed wrist to wrist behind his back constituted an excessive use of force which amounted to objectively unreasonable conduct under the circumstance." It is further stated that this "objectively unreasonable conduct" was a violation of the Fourth and Fourteenth Amendment and that it caused plaintiff injury. Gall contends that plaintiff has not adequately identified which clause of the Fourteenth Amendment he is suing under. Legal labels, however, are not controlling; it is the facts alleged that are controlling. *See Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984); *Home Savings of America, F.A. v. The Inland Group, Inc.*, No. 91 C 4181 at 18 (N.D. Ill. Dec. 3, 1991). It is clear from the facts alleged that plaintiff is alleging an excessive force claim which is cognizable under § 1983 and governed by a Fourth Amendment objective reasonableness standard. *See Graham v. Connor*, 109 S. Ct. 1865, 1871-72 (1989); *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990). Count 1 will not be dismissed.

Counts 7 and 11 against the City are § 1983 claims alleging that the City is responsible for the failure to promptly bring plaintiff before a judge or magistrate after his arrest. It is alleged that plaintiff remained in a hospital in the custody of the City from the day of his arrest on March 15 until he was transferred to the County Jail on March 20. In Count 7, it is alleged that the City has a policy of not bringing hospitalized arrestees before a judge. Count 11 charges a failure to bring him before a judge from the time plaintiff was transferred to the County Jail until April 15. In that count it is alleged that the City, Sheriff, and State's Attorney fail to have a "coordinated official policy" to ensure that arrestees are promptly brought before a judge.

Except for alleging that he himself was not present before the judge who determined that there was probable cause to detain him, plaintiff does not claim any other deficiency with the March 16 proceeding. Also, plaintiff does not allege that probable cause to arrest him did not exist. Furthermore, the determination of the existence of probable cause was made within 48 hours of plaintiff's arrest and no facts are alleged to overcome the presumption that the determination was therefore made within a prompt period of time. *See County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1670 (1991). The only question the allegations raise regarding the propriety of the probable cause determination is the question of whether it was necessary for plaintiff to be present during the proceeding.

Ideally, no person would be arrested without a judicially approved warrant being issued prior to the arrest.

See Gerstein v. Pugh, 420 U.S. 103, 113 (1975). As a practical matter, though, many arrests must be made without a warrant. Just as an arrest warrant is not to be issued without a neutral and detached judicial officer first finding probable cause that a crime was committed, in the situation of a warrantless arrest, there must be a post-arrest determination by a neutral and detached judicial officer that probable cause exists that a crime was committed. *See id.* at 114. The post-arrest *Gerstein* probable cause hearing, therefore, should have no greater procedural requirements than that for issuing an arrest warrant. While a state or municipality is certainly free to provide full adversarial proceedings for post-arrest determinations of probable cause, the Constitution does not mandate such a proceeding. Therefore, it is not constitutionally required that the adversarial safeguards of counsel, confrontation, cross-examination, and compulsory process of witnesses be provided at *Gerstein* proceedings. *Id.* at 119-22. Just as the proceeding for issuing an arrest warrant need not be held in the presence of the arrestee, it is not constitutionally mandated that the arrestee be present at a *Gerstein* proceeding. *McLaughlin v. County of Riverside*, 888 F.2d 1276, 1279 (9th Cir. 1989), *vacated & remanded on other grounds*, 111 S. Ct. 1661 (1991). Even though he was not present at the proceeding, since a timely probable cause determination was made following plaintiff's arrest, his *Gerstein* claims must fail. Since plaintiff does not argue that any constitutional principle other

than that set forth in *Gerstein* and its progeny was violated by his one-month detention, no basis exists for his continuing to pursue Counts 7 and 11 against the City.[2]

Gall and the City also move to dismiss Counts 4 and 5. Count 4 is a claim for violation of the Illinois Constitution and Count 5 is a claim for the intentional infliction of mental suffering. Plaintiff makes no response to defendants' arguments as to these two counts. Since plaintiff fails to present any argument supporting that Counts 4 and 5 adequately state a claim under Illinois law, these counts will be dismissed.

IT IS THEREFORE ORDERED that defendants City of Chicago's and O'Malley's motions to dismiss are granted. Defendant Gall's and Cook County Department of Corrections' motions to dismiss are granted in part and denied in part. Counts 4, 5, 7 and 9 are dismissed. Count 11 is dismissed as against defendants Department of Corrections, O'Malley, and City of Chicago. Defendant Sheriff of Cook County in his official capacity is substituted for defendant Department of Corrections on Counts 6 and 8. Defendants O'Malley and Department of Corrections are dismissed from this case. Defendants' motion for

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[2] The same ruling would appear to be applicable to the federal claims against the Sheriff and English. Those parties, however, have not yet moved to dismiss the claims against them so any ruling as to the claims against them will await an appropriate motion. It is also noted that despite the dismissal of the federal claims against the City, this court still has supplemental jurisdiction over the state law claims against the City in that the state law assault and battery claim arises from the same occurrence as the excessive force claim and a recent statutory change permits pendent party jurisdiction. *See* 28 U.S.C. § 1367(a).

sanctions is denied. Within two weeks, defendants Gall and City of Chicago shall answer the remaining counts against them.

ENTER:

William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: DECEMBER 23, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAFAEL GARCIA,	)	
Plaintiff,	)	
v.	)	No. 91 C 5535
CITY OF CHICAGO, et. al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

In an order dated December 23, 1991, certain of plaintiff's claims were dismissed, including all the claims against defendants O'Malley and the Department of Corrections. It is also noted in that order that it appeared the claims against defendants English and Sheriff Sheahan should be dismissed, but that issue had not yet been presented to the court. See December 23 Order at 7 n.2. When the order was distributed on December 23, substitute counsel appeared for plaintiff so the court did not then resolve the issue of the viability of the claims against English and Sheahan. The motion for summary judgment by those defendants was entered and continued and substitute counsel was told to inform plaintiff's counsel that he should consider whether he wished to continue to pursue the claims against those two defendants. On January 2 and 3, 1992, plaintiff filed motions to reconsider the December 23 Order, for leave to file a second amended complaint, and for entry of a preliminary injunction. Those motions were taken under advisement and are pending.

The motion for reconsideration is denied. For the reasons set forth in the December 23 Order, the hearing required by *Gerstein v. Pugh*, 420 U.S. 103 (1975), does not have to be conducted with the defendant present.[1]

Plaintiff seeks to file a second amended complaint continuing to bring *Gerstein* claims against all the defendants named in the first amended complaint except Gall and the Department of Corrections. Plaintiff also seeks to bring his claim as a class action seeking injunctive relief. As held in the December 23 Order, plaintiff has no viable *Gerstein* claim. Also, Garcia has no standing to bring a claim for injunctive relief because he is no longer incarcerated and was not incarcerated at the time he first filed the present action. This case, therefore, is unlike *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1667 (1991), where the plaintiffs had standing because they were still incarcerated and had not yet had a *Gerstein* hearing at the time they first filed their complaint.

In the second amended complaint, plaintiff adds the additional allegation that he possessed a white, powdery substance at the time of his arrest. He further alleges that laboratory tests of that substance were not completed until March 26, 11 days after his arrest. The tests revealed the powder was not a controlled substance. It was not

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[1] Although plaintiff makes other arguments in his motion for reconsideration, they are actually arguments in support of permitting the filing of the second amended complaint and will be considered in that context. Unlike the *Gerstein* issue, the additional arguments relate only to factual allegations in the second amended complaint, not issues raised by the facts alleged in the first amended complaint.

until April 10, however, that the charges against plaintiff were dismissed. On April 12, a court order granting withdrawal of the probation violation petition was granted. Plaintiff was not released until April 15. The continued incarcertion of plaintiff could possibly constitute a due process violation. *Cf. Sample v. Diecks*, 885 F.2d 1099, 1114-16 (3d Cir. 1989). Plaintiff, however, argues only that *Gerstein* was violated and that false arrest and false imprisonment occurred in violation of the Fourth and Fourteenth Amendments. As previously discussed, no *Gerstein* violation is stated. Since, as discussed below, there was probable cause to arrest, there can be no false arrest claim or a related false imprisonment claim. *See Mark v. Furay*, 769 F.2d 1266, 1268-69 (7th Cir. 1985). Also, the factual allegations of the proposed amended complaint are unclear as to who can be held responsible for any improperly excessive detention that may have occurred. *Compare Diecks*, 885 F.2d at 1117-19. On the present legal arguments and given the present proposed amended complaint, leave to amend will not be granted.

Plaintiff argues that the proposed second amended complaint states a claim for arrest without probable cause. Plaintiff, however, alleges that defendant Gall found a plastic envelope with a white, powdery substance at plaintiff's feet. Although it was later discovered that the powder was not a controlled substance, that was not known at the time of plaintiff's arrest. The allegations support that Gall had probable cause to arrest plaintiff. The second amended complaint does not state a sufficient claim for arrest without probable cause.

Finally, plaintiff makes no argument supporting the continued vitality of the first amended compliant claims

against defendants Sheahan and English. The claims against those defendants will be dismissed consistent with the December 23 ruling on the *Gerstein* claims. The motion for summary judgment is denied as moot.

IT IS THEREFORE ORDERED that plaintiff's motions for reconsideration, for leave to file a second amended complaint, and for a preliminary injunction are denied. Counts 2, 6, 8, 10, and 11 of the First Amended Complaint are dismissed. Defendants English and Sheahan in their individual and official capacities are dismissed from this case. Defendants English's and Sheahan's motion for summary judgment is denied without prejudice as moot. All discovery shall be completed by March 27, 1992. Status hearing set for January 30, 1992 at 9:15 a.m.

ENTER:

William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: JANUARY 15, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAFAEL GARCIA, Plaintiff,	)	
v.	)	No. 91 C 5535
CITY OF CHICAGO, et. al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

In his Third Amended Complaint, plaintiff Rafael Garcia alleges various constitutional claims against defendants City of Chicago and Anna Gall, a Chicago police officer. Count I is an excessive force claim against Gall. Count II is a false arrest claim against Gall in which it is alleged that she "dropped" or planted a bag of white powder in front of plaintiff so as to charge him with possession of cocaine. Count III is a false arrest claim against Gall alleging that she failed to submit the white powder to any test; she did not taste or smell it, nor did she use a Cobalt Thiocyanate Spot Test ("Cobalt Test"). Count IV is an excessive detention claim against Gall in which it is claimed that Gall would have known that her false arrest would cause plaintiff to be detained for the substantial period of time it would take to test the white powder that Gall knew or should have known was not cocaine. Count V is a claim against the City for having a custom or policy of not providing the Cobalt Test to district police officers so that officers can know within 90

minutes whether a substance is cocaine. Count VI overlaps with Count V, but is directed at existing police laboratory testing of cocaine being deficient in that it takes too long a period of time to determine if seized substances are cocaine. Defendants have moved to dismiss Counts III through VI. On a motion to dismiss, all the well-pleaded allegations of the complaint are assumed to be true and all reasonable inferences are drawn in favor of the plaintiff. *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1039 (7th Cir. 1987).

In Count III, it is alleged that Gall found a bag of white powder at Garcia's feet. For purposes of Count III, it is assumed that Garcia had possessed the powder, unlike Count II where it is alleged Gall placed the powder in Garcia's possession. Garcia alleges that Gall relied on "the size, shape and appearance of the white powder contents of the bag and the size and shape of the bag itself" in determining that it contained cocaine. Garcia contends that, absent further testing such as taste, smell, or a Cobalt Test, probable cause to arrest him did not exist.[1]

Unless it is clearly established that a police officer cannot rely on size, shape, and appearance of a bag and the white powder inside it to determine there is probable

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[1] Plaintiff does not allege the facts that led up to his being stopped by Gall. There are no allegations that Gall had an insufficient basis for initially stopping Garcia. On the other hand, there are also no allegations that support Gall had any reason other than the bag of white powder for suspecting that Garcia possessed a controlled substance. However, it is alleged that 80 to 90 percent of Gall's past narcotics arrests had been for cocaine.

cause the powder is controlled substance, Gall would be qualifiedly immune from any claim for damages against her. *See generally Williams v. Anderson*, 959 F.2d 1411, 1414 (7th Cir. 1992); *Auriemma v. Rice*, 910 F.2d 1449 (7th Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 2796 (1991). Not only is there no case law clearly establishing that Gall lacked probable cause under the facts alleged in Count III, there are cases to the contrary, supporting that the facts alleged in Count III constitute probable cause for concluding the bag contained cocaine and thus there would be probable cause to arrest the person who possessed the bag. *See United States v. Potter*, 895 F.2d 1231, 1234 n.1 (9th Cir.), *cert. denied*, 110 S. Ct. 3247 (1990); *United States v. Campbell*, 843 F.2d 1089, 1095 (8th Cir. 1988); *United States v. Miller*, 769 F.2d 554, 557 (9th Cir. 1985); *United States v. Vasquez*, 638 F.2d 507, 525 (2d Cir. 1980), *cert. denied*, 450 U.S. 970, 454 U.S. 847, 975 (1981); *United States v. Rosario*, 638 F.2d 460, 462 (2d Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981); *United States v. Vasquez*, 634 F.2d 41, 43 (2d Cir. 1980). *See also Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)) ("[P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false."). Count III will be dismissed since the facts alleged support that Gall had probable cause to arrest Garcia.

In Count IV it is alleged that Gall is liable to Garcia for the injury of being held in custody for almost a

month. This should not be stated as a separate count, but instead simply states one form of damages that may have resulted from the false arrest alleged in Count II. Count IV will be dismissed, but without prejudice to claiming the injury of detention as part of the damages for Count II. It will not presently be determined whether such damages may properly be considered to be recoverable as being proximately caused by the false arrest alleged in Count II. Gall asserts that she was not responsible for Garcia's continued detention. While it is true, under the facts alleged, that Garcia was actually in the custody of others, those others would have relied on Garcia being reported to have been in possession of a white powder. Whether that is a sufficient causal connection is not adequately addressed by the parties and therefore a claim for such damages will not be dismissed on the present motion, but will be considered part of the claim for damages set forth in Count II.

In Count V, it is alleged that the City is liable to Garcia because it has a policy of not providing each of its police districts with an "inexpensive and practical" field test kit which would test for cocaine and some other controlled substances and produce results within 90 minutes. Having Cobalt Test kits available in each police district may or may not be a wise policy for the Chicago Police Department to follow. The question for this court, however, is whether such a policy is mandated by the Constitution. As the Seventh Circuit has stated:

> [T]he Constitution does not require police to follow the best recommended practices. There is a gap, often a wide one, between the wise and the compulsory. To collapse those two concepts

> is to put the judicial branch in general superintendence of the daily operation of government, which neither the fourth amendment nor any other part of the Constitution contemplates.

Gramenos v. Jewel Cos., 797 F.2d 432, 442 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987).

Neither the allegations of the complaint nor the arguments of plaintiff are sufficient to support a holding that the Constitution mandates that the Chicago Police Department provide Cobalt Test kits for all of its district police stations. Count V will be dismissed.

In Count VI, plaintiff complains that the City's laboratory procedures for testing seizures believed to be cocaine is insufficient in that the City takes too long a period of time to conduct the tests. In Garcia's case, it is alleged that it was 11 days after his March 15, 1991 arrest before it was determined that the white powder he had allegedly possessed was not cocaine.[2] As regards a policy or custom of the City, it is alleged that the Cobalt Test is never used and that all testing for cocaine is done at a central laboratory. It is alleged that testing for cocaine commonly takes 10 to 20 days for the Police Department

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[2] It is also alleged that the drug charges against Garcia were not dismissed until April 10, 15 days after laboratory results showed the substance he allegedly possessed was not cocaine. On April 12, a petition for revocation of his probation, which was based on the alleged possession of cocaine, was also dismissed. Garcia was not released from jail until April 15. Nothing is alleged as to what happened between March 26 (the day of the results) and April 10 (the date charges were dismissed). There is no direct allegation of a delay in communicating the results of the test.

laboratory to accomplish. It is further alleged that no attempt is made to separate out for quicker processing substances seized from persons who are being held in custody pending trial nor is any attempt made to expedite communication of negative test results. It is also alleged that "delays in the testing and in the communication of the test results in the case of the Plaintiff were not an isolated instance but were fairly typical of the delays in the submission of the suspected substances submitted for testing to the central laboratory." Other than Garcia's one experience, there are no allegations of any specific instance of either delays in test results or of any person being incarcerated awaiting delayed negative results.

Conduct that results in unreasonable, unnecessary, and unjustified delays in processing and releasing arrestees violates the Constitution if done intentionally or with deliberate indifference to the rights of the arrestees. *See Sivard v. Pulaski County*, 959 F.2d 662 (7th Cir. 1992); *Hood v. City of Chicago*, 927 F.2d 312 (7th Cir. 1991). On the motion to dismiss, it must be assumed that 10 to 20 days is an unreasonable amount of time to determine whether a substance is cocaine.[3] The city argues, however, that

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[3] Whether any such delays that may have occurred at the Chicago Police laboratory are unreasonable or unjustified would be a question of fact requiring inquiry into the nature of available test procedures and other factors. Among the other factors would be the question of reliability or unreliability of less formal tests for cocaine, such as visual inspection. For example, if a high percentage of the police seizures believed to be cocaine actually are cocaine, then there is less of a need for quick confirmation by laboratory tests. How often powders or other substances are misidentified as cocaine, how often this results in unnecessary detentions, and the knowledge of Police

Garcia has failed to allege adequately the existence of any municipal policy or custom. The City cannot be held liable unless a policy or custom of the City caused plaintiff to suffer constitutional injury. *See Sivard*, 959 F.2d at 668.

Alleging an adequate claim against a municipality requires greater specificity than the ordinary pleading standard applicable under the Federal Rules of Civil Procedure. *Id.* at 667. Boilerplate or conclusory allegations of a municipal policy or custom will not suffice. *Id.* at 667 n.14; *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985). The allegation of a single incident of unconstitutional conduct by a municipal employee along with a conclusory allegation of a policy or custom is not sufficient to establish municipal liability. *Id.* Ordinarily, more than one instance of unconstitutional conduct must be specifically alleged. *Id.* at 769; *Hossman v. Blunk*, 784 F.2d 793, 797 (7th Cir. 1986). Allegations of multiple specific incidents, however, are not the only means of factually supporting a municipal policy or custom claim. *See Strauss*, 760 F.2d at 760 F.2d at 769 (a "plaintiff must plead some fact or facts tending to support his allegation that a municipal policy or custom exists that could have caused his injury"). A single incident supported by detailed and specific allegations of the nature of the policy or custom, *see Ruehman v. Village of Palos Park*, 1992 WL 170565 at *7-8 (N.D. Ill. July 16, 1992), or sufficient facts that lead to a conclusion that an official policy or custom must have caused the single incident alleged, *see Sivard*, 959 F.2d at

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officials as to such occurrence are all factors to be considered in determining if the City acted with deliberate indifference.

668-69; *Murray v. City of Chicago*, 634 F.2d 365, 366-67 (7th Cir. 1980), *cert. dismissed*, 456 U.S. 604 (1982), can also support claims against a municipality.

Plaintiff's complaint, however, does not contain detailed allegations of the functionings of the police laboratory. *Compare Ruehman, supra* (detailed allegations as to procedures used by the Circuit Clerk, County Sheriff, Illinois State Police, and various municipal police departments to report the quashing of warrants on computerized networks, including identification of specific deficiencies in the procedures that resulted in quashed warrants not being removed from the computer networks). While Garcia generally alleges that delays in testing substances exist, there are no allegations as to specific procedures employed at the police laboratory. Also, this is not a situation like *Sivard*, where the existence of a municipal policy or custom can be presumed. Additionally, unlike *Sivard*, which was a ruling on a motion for summary judgment, there are no admitted facts of the defendant that lend support to the existence of a municipal policy or custom claim of intentional or indifferent delay. *See Sivard*, 959 F.2d at 668-69. Count VI will be dismissed.

IT IS THEREFORE ORDERED that defendants' motion to dismiss Counts III through VI is granted. Counts III, IV, V and VI of plaintiff's third amended complaint are dismissed. Defendant City of Chicago is dismissed from this case. Ruling date of August 13, 1992, is stricken. Remaining parties shall file an original and

copy of their proposed pretrial order in open court on September 10, 1992 at 9:15 a.m.

ENTER:

William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: AUGUST 7, 1992

Supreme Court, U.S.
FILED
JAN 6 1995
OFFICE OF THE CLERK

No. 94-870

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RAFAEL GARCIA,
Petitioner,
v.
CITY OF CHICAGO, JACK O'MALLEY, State's Attorney of Cook County, MICHAEL F. SHEAHAN, Sheriff of Cook County, and C. RICHARD ENGLISH,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

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QUESTIONS PRESENTED*

1. Whether, in cases in which the police have probable cause to believe that an individual possesses a controlled substance, the Constitution requires the police to perform a cobalt thiocyanate spot test on the substance before they may charge the individual with that offense.

2. Whether the Constitution requires an arresting authority to conduct a drug test on a substance seized from an arrestee who is in custody pending trial and to disclose its result more quickly than at the scheduled preliminary hearing, which is held within 30 days of arrest.

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* We address only the questions presented with respect to the City of Chicago. The remaining questions presented in the petition are directed at Jack O'Malley, Michael F. Sheahan, and C. Richard English. Those respondents are officials of Cook County, Illinois. We do not represent those respondents, and this brief is not filed on their behalf.

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BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1-18) is reported at 24 F.3d 966. The opinions of the United States District Court for the Northern District of Illinois (Pet. App. 20-40) are unreported.

STATEMENT

On March 15, 1991, a Chicago police officer arrested petitioner Rafael Garcia ("Garcia") after observing a bag containing white powder at his feet. Pet. App. 1. Garcia was injured during the course of arrest and was taken to a local hospital, where he remained in custody.

Id. at 1-2. The next day, while Garcia remained hospitalized, counsel was appointed for him; and a judge found probable cause to charge him with possession of a controlled substance. *Id.* at 2. Because Garcia was then on probation and also had a bond forfeiture warrant outstanding, the court issued a probation violator's warrant, and set bond on both that charge and the charge of possession of a controlled substance. *Id.* at 1-2. Garcia did not make bond. *Id.* at 2.

On March 18, the court scheduled a preliminary hearing for April 10, 1991.[1] On March 20, Garcia was transferred from the hospital to Cook County Jail. Pet. App. 2, 24. On March 26, the City of Chicago's Police Department's laboratory tested the white powder seized at Garcia's arrest and found that it did not contain any controlled substance. *Id.* at 2. The laboratory communicated that information to the prosecutor (the office of the State's Attorney for Cook County), and at the preliminary hearing on April 10, the court granted the prosecution's request to dismiss the case. *Ibid.* Garcia then filed an action under 42 U.S.C. § 1983 against the City of Chicago; Chicago Police Officer Anna Gall; Cook County State's Attorney Jack O'Malley; Cook County Sheriff Michael Sheahan; the Cook County Department of Corrections; and then-acting Executive Director of Cook County Jail C. Richard English.[2] Garcia sought damages for his allegedly unconstitutional arrest and detention.

Ruling on the defendants' motions to dismiss Garcia's complaint, the district court concluded that Garcia's claims against the State's Attorney were barred by the

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[1] Under Illinois law, a felony arrestee is entitled to a preliminary hearing within 30 days of arrest. See 725 ILCS paras. 5/109-3, 5/109-3.1 (1992).

[2] As we explain elsewhere, we address only the claims against the City of Chicago. See *supra* at i n.*; *infra* at 3-4.

Eleventh Amendment (Pet. App. 22-23), and that the Constitution did not require Garcia's presence at the probable cause hearing held on the day after his arrest (*id.* at 24-26). Those claims were therefore dismissed. The court also ruled that the complaint adequately alleged an excessive force claim against the arresting officer. *Id.* at 24-26. Garcia sought reconsideration of the ruling that his probable cause hearing was constitutionally sufficient without his presence; he also sought leave to file a second amended complaint. The district court denied the motion to reconsider (*id.* at 28-29), denied leave to file the amended complaint (*id.* at 31), and also held that Garcia's arrest was supported by probable cause (*id.* at 29-30).

Garcia then filed a third amended complaint against only the City of Chicago and Officer Gall. The City defendants again filed a motion to dismiss, which the district court granted in part. The court concluded that if the officer found a bag containing white powder at Garcia's feet, she would have had probable cause to arrest him, defeating his false arrest claim (*id.* at 33-34); that the City's policy of not providing each of its police districts with cobalt thiocyanate kits in order to do spot-testing of suspected controlled substances did not violate the Constitution (*id.* at 35-36); and that the City's alleged policies of failing to perform tests on suspected controlled substances at the Police Department's laboratory with sufficient speed, and failing to notify the prosecutor, defense, or court of negative test results with sufficient speed, also failed to state meritorious claims (*id.* at 36-39). The court did not dismiss Garcia's claim of excessive force in the course of the arrest or the false arrest claim based on Garcia's allegations that Gall planted the bag of white powder at his feet. *Id.* at 32, 39. The court also ruled that damages flowing from Garcia's failure to make bond could be considered as part of Garcia's surviving claim for false arrest. *Id.* at 34-35.

Thereafter, Garcia settled his excessive force claim and false arrest claim against the City and the arresting officer. He then appealed, contesting the district court's dismissal of the claims against the State's Attorney, the Cook County Sheriff and the Director of the Cook County Department of Corrections, as well as his claims attacking the City's policies for testing controlled substances. The court of appeals held, first, that the claims against the State's Attorney were barred by the Eleventh Amendment (Pet. App. 4); second, that the Constitution did not grant Garcia a right personally to attend his probable cause hearing (*id.* at 4-5), third, that because Garcia's arrest was supported by probable cause, the Constitution did not require the City to conduct a cobalt thiocyanate spot test (*id.* at 6-7); and fourth, that the City's laboratory did not unconstitutionally delay disclosing the results of the test on the white powder, since the results were disclosed in time for the next scheduled court hearing, held within 30 days of Garcia's arrest (*id.* at 7-9).

ARGUMENT

Garcia has settled his claims against the officer who arrested him, and hence the only remaining municipal defendant is the City of Chicago. Garcia can prevail against the City only if he identifies some policy, custom, or practice of the City that inflicted constitutional injury upon him. *E.g., Monell v. Department of Social Services,* 436 U.S. 658, 694 (1978). While this Court held in *Gerstein v. Pugh,* 420 U.S. 103 (1975), that the Fourth Amendment grants a person arrested without a warrant the right to a prompt post-arrest judicial determination that the arrest is supported by probable cause, Garcia does not contend that the City has a policy, custom, or practice of either arresting individuals without probable cause, or failing to provide them with reasonably prompt probable cause hearings. Thus, his complaint states no claim under *Gerstein.*[3] Nevertheless, Garcia seeks to impose constitutional requirements on police throughout the country that exceed the standard of probable cause—specifically, Garcia contends that police should be required to do scientific testing to buttress arrests made on probable cause, and that they should be required to expedite their investigation of an arrestee even after a judicial officer has found probable cause to support an arrest. Whatever the

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[3] While portions of Garcia's petition suggest that his claim of an entitlement to be personally present at his probable cause hearing is made against the City, as the court of appeals correctly observed, Garcia failed to preserve this claim against the City. See Pet. App. 5 n.4. In addition, even if Garcia were correct as a general matter that an arrestee is constitutionally entitled personally to attend a probable cause hearing, he does not explain why or how this requirement would apply to hospitalized arrestees like Garcia. Nor does Garcia allege that he was even medically capable of attending his probable cause hearing. And if there were no violation of Garcia's rights because he was hospitalized, he lacks standing to forward a policy claim against the City under Section 1983 based on its treatment of persons not needing medical attention. See *City of Los Angeles v. Heller,* 475 U.S. 796 (1986) (per curiam).

merits of Garcia's suggestions as a matter of law enforcement policy, there is no constitutional basis for deviating from the standard of probable cause. Thus, neither of Garcia's claims has merit.

1. In the court of appeals, Garcia did not dispute that there was probable cause to arrest him. As that court observed, "Garcia concedes that finding a white powder in a person's possession provides probable cause to arrest that person for possession of cocaine." Pet. App. 6. And, as we explain above, Garcia has never claimed that the City has a custom, policy or practice of arresting individuals without probable cause. Instead, Garcia's argument is that "some type of confirmatory test should have been done" (Pet. 35); in the court below Garcia contended "the cobalt thiocyanate spot test" was constitutionally required (see Pet. App. 7). Nothing in the Constitution, however, obligates an arresting authority to perform any further investigation once it makes an arrest on probable cause.

In *Baker v. McCollan*, 443 U.S. 137 (1979), for example, McCollan claimed that his constitutional rights were violated because, after his arrest, Sheriff Baker failed to investigate his claim that he was not the person named in the warrant on which he had been arrested. McCollan argued that the Sheriff could have quickly and easily compared his photograph and fingerprints to those of the person named in the warrant, but unreasonably failed to do so, causing McCollan to be incarcerated over a three-day weekend until the error was discovered. See *id.* at 139-42. This Court rejected McCollan's claim. The Court observed that the Fourth Amendment requires only that a judicial officer make a determination whether there is probable cause for an arrest either before or promptly after an arrest, and since McCollan had been arrested on a warrant issued after such a determination, his detention "met the standards of the Fourth Amend-

ment." *Id.* at 144. McCollan's due process claim fared no better:

> Given the requirements that arrests be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim. The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.

Id. at 145-46 (footnote omitted). Accord *Albright v. Oliver*, 114 S. Ct. 807, 818 (1994) (Kennedy, J., concurring in the judgment).

This principle disposes of Garcia's claim. While he claims that it would be easy and efficient for the City to stock cobalt thiocyanate spot tests in every police district to use on all suspected cocaine seized from arrestees, this claim is no stronger than McCollan's claim that it would have been easy for the sheriff to check his photograph and fingerprints against that of the individual named in the warrant. We know of no authority inconsistent with the proposition on which the decision of the court of appeals here rests—"once police officers have discovered sufficient facts to establish probable cause, they have no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence." Pet. App. 6 (quoting *Schertz v. Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989)).

Indeed, the only authority Garcia cites in this portion of his petition is *Pennington v. Hobson*, 719 F. Supp. 760 (S.D. Ind. 1989), but that decision rejects his argument. In *Pennington*, the district court concluded that

the Constitution did not afford an arrestee a right to any type of expedited laboratory tests on suspected narcotics. See *id.* at 777. Thus there is no split of authority—much less a split among the circuits—on the question presented in the petition. And even if at some point a delay in conducting laboratory tests could violate the Due Process Clause,[4] the court of appeals did not hold that the Constitution never imposes a duty to investigate upon the police, but rather only that the testing delays alleged by Garcia were not constitutionally unreasonable. See Pet. App. 7. While it would perhaps be troubling if the City had a policy of conducting no tests whatsoever on substances seized from arrestees who denied that those substances were illicit drugs, Garcia does not claim that the City has such a policy. Rather, he alleged that the City conducts drug tests within 10 to 20 days of arrest—and the court of appeals correctly held that this is constitutionally sufficient. What is more, if defense counsel believes that it is in his client's interest to obtain expedited testing of a substance seized from his client, counsel may arrange for such testing by the defense. As the court of appeals noted, the Compulsory Process Clause of the Sixth Amendment and Ill. Sup. Ct. R. 412(a)(v) secure the defense's right to obtain a sample of the powder seized during an arrest and to test it. Pet. App. 7 n.5. Thus, arrestees are not at the mercy of the City's decisions about how quickly to test substances; they can expedite testing themselves. For these reasons, the City's policies are not fundamentally unfair, are consistent with all the precedents to consider this question, and satisfy the only standard specified in the Constitution itself for seizing an arrestee prior to trial—probable cause.

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[4] *Baker v. McCollan* itself suggests that at some point the Due Process Clause could impose some duty to investigate an arrestee's claims of innocence. See 443 U.S. at 145 ("we may assume, arguendo, that, depending on what procedures the State affords defendants following arrests and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty without due process of law' ").

2. Garcia's other claim against the City is that "his continued detention after the negative drug test report was made was unreasonable in duration and therefore unconstitutional." Pet. 32. What happened here, of course, is that the City disclosed the test results to the prosecutor—who, unlike the City's laboratory, is in the position to know whether the defendant is charged only with test-related drug charges, or with other crimes as well—and that disclosure was made before Garcia's next scheduled court appearance. Indeed, the City tested the white powder seized at Garcia's arrest within ten days, and reported the results of its test to the State's Attorney's office in time for those results to be disclosed at the preliminary hearing held 26 days after the arrest, leading the prosecution to dismiss the case against Garcia. Pet. App. 1-2. Thus, test results were obtained and disclosed to the prosecution by the time of the preliminary hearing held within 30 days of arrest.

Such a procedure comports with the Constitution. There is not even a colorable Fourth Amendment objection to this procedure. In *Gerstein v. Pugh*, the Court held that the Fourth Amendment requires that a judicial officer make a probable cause determination promptly after a warrantless arrest (see 420 U.S. at 113-14, 124-25), but it also held that such a determination is sufficient to bring the arrestee to trial without need of any subsequent reexamination of probable cause at a preliminary hearing or otherwise (see *id.* at 119-24). Garcia received a prompt post-arrest judicial determination of probable cause; thus the Fourth Amendment was satisfied here.[5]

Dressed in due process garb, Garcia's claim fares little better. The City disclosed the negative drug test to the

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[5] In *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), the Court elaborated upon *Gerstein*'s requirement of a prompt hearing and held that the probable cause hearing must ordinarily be held within 48 hours of arrest. See *id.* at 1670. Garcia has never claimed that the City does not comply with this requirement.

prosecution, which in turn disclosed it to the court and the defense, not only before trial, but prior to the preliminary hearing, and in sufficient time to enable the prosecution to dismiss the charges against Garcia at that hearing held less than a month after his arrest. Assuming that a duty to disclose exculpatory evidence during pretrial proceedings can be derived from the due process right to disclosure of exculpatory evidence before trial recognized by *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, nothing in these cases requires that such disclosures be expedited so that a trial or hearing date can be advanced. As *Baker v. McCollan* explains, such timing issues are governed not by the Fourth Amendment or the Due Process Clause of the Fourteenth Amendment, but rather by the Speedy Trial Clause of the Sixth Amendment.

In any event, Garcia makes no allegation that the City unreasonably delayed informing the prosecution of the test results; indeed, there is nothing in Garcia's complaint that even suggests that the City did anything other than send those results to the prosecution as soon as they were available. The complaint does not explain why the failure to release Garcia earlier was caused by a policy of the City, and not merely the State's Attorney's failure to disclose results it had received from the City sooner. While Garcia, of course, need only plead sufficiently to give the City fair notice of the nature of the policy claim against it (see *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct 1160 (1993)), nothing in the complaint provides even the barest notice why Garcia taxes the City with the failure to advance the preliminary hearing once the test results were available.[6] Nor does the complaint explain why

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[6] All the complaint alleges is that "delay in communicating the test results from March 26th to April 10 is an unreasonable amount of time" and that "following the same procedures and delays for incarcerated suspects as are followed for suspects out on bail is an unreasonable procedure given the usual time delays involved . . . ." R. 259 paras. 21-22.

Garcia pins on the City the delay in reinstating his probation. As the court of appeals explained, Garcia could not properly be released until his probation was reinstated, and that did not occur until after two days after his preliminary hearing. Pet. App. 7-8. Thus this complaint fails even notice pleading of a policy claim—the complaint does not explain how the City is at fault for the delay in releasing him after the test results were available, or how the notice of test results given to the prosecution was deficient.

Even if the Constitution may in some cases require expediting the disclosure of exculpatory information, that is not the same as requiring immediate disclosure. The Constitution does not require a perfect criminal justice system, but rather only a reasonably fair one. As this Court observed in *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), in deciding how quickly the system must process arrestees, courts must remain cognizant of the practical realities of the criminal justice system. See *id.* at 1670. The system is already severely overburdened. Speeding up the testing process, and seeking the release, prior to the scheduled preliminary hearing, of those who test negative (and are not also held on other charges) would require large expenditures of resources—for staff to identify cases in which testing should be expedited, and the communication of test results to the prosecution hastened, and for more testing equipment, more technicians, more prosecutors, and more judges. It is not constitutionally unreasonable for a municipality to conclude that the costs of such measures do not justify the benefits flowing from a few cases in which the arrestee might be released from custody a few days earlier, if only the test had occurred earlier, the results communicated to the prosecution sooner, and the preliminary hearing then advanced. This is especially true because under Illinois law, as we explain above, the defense can itself perform expedited testing if it wishes. In short, if it is constitutionally permissible to postpone a

preliminary hearing for 30 days—as Illinois does without challenge from Garcia—it is equally reasonable to complete the process of obtaining and disclosing test results on a like schedule.

While Garcia never claims there is a conflict in the circuits on the question he presents in his petition, he does cite two decisions for the proposition that the Constitution forbids "continuing detention after proof which makes it objectively impossible that [the arrestee] committed the crime charged." Pet. App. 32-33. But both cases involved the suppression of exculpatory evidence, rather than the failure to expedite its disclosure even sooner than the next scheduled hearing.

In *Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992), the arresting officer received overwhelming evidence of Sanders' innocence, yet failed to notify the prosecutor or his superior officer. See *id.* at 1156-58. As a result, Sanders was not released from jail until 50 days after his arrest, when his attorney presented exculpatory evidence to the prosecutor. See *id.* at 1158. Similarly, in *Gay v. Wall*, 761 F.2d 175 (4th Cir. 1985), the defendant police officers intentionally kept Gay in custody after they "had actual knowledge of his innocence," deciding to "detain[] him until they could 'find the right man.'" *Id.* at 178. Here, the City is not alleged to have a policy of concealing exculpatory evidence from the prosecution, defense or the court. Rather, its policy is to conduct laboratory tests and disclose their results prior to the preliminary hearing. That policy ensures that arrestees will have the benefit of any exculpatory evidence the City's laboratory generates within 30 days of their arrest. Moreover, because the complaint does not explain why the City's policies are at fault for the failure to advance a preliminary hearing once a negative test result occurs, and since Illinois law provides the defense with access to exculpatory evidence and a means to expedite its testing and disclosure, this case is a far cry from the intentional concealment of exculpatory evidence un-

available to the defense that was at issue in *Sanders* and *Gay*.

In short, Garcia cannot identify a split of authority in the lower courts, any reason why the City's policies are responsible for the failure to release him until his preliminary hearing, or any feature of the Illinois preliminary hearing system that prevents the defendant himself from obtaining expedited testing of substances seized at the time of arrest. There is thus no merit to Garcia's claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

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January 6, 1995

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(4)

No. 94-870

Supreme Court, U.S.
FILED
FEB 8 1995
CLERK OF THE COURT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RAFAEL GARCIA,

Petitioner,

v.

CITY OF CHICAGO, JACK O'MALLEY, State's Attorney of Cook County, MICHAEL F. SHEAHAN, Sheriff of Cook County, and C. RICHARD ENGLISH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS JACK O'MALLEY, MICHAEL F. SHEAHAN AND C. RICHARD ENGLISH IN OPPOSITION

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QUESTIONS PRESENTED*

1. Whether the Fourth Amendment requires the presence of a hospitalized arrestee at his probable cause hearing.

2. Whether Garcia, who was not incarcerated at the time he filed suit, had standing to seek injunctive relief and whether the State's Attorney is a state official entitled to Eleventh Amendment immunity.

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* We address only the questions presented with respect to State's Attorney Jack O'Malley, Sheriff Michael F. Sheahan, and C. Richard English. The City of Chicago has addressed the remaining questions in its brief in opposition.

Constitutional Provisions:

U.S. Const. Amend. IV ..... *passim*
U.S. Const. Amend. XIV 5, 7

Statutes:

42 U.S.C. § 1983 2

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OPINIONS BELOW

The opinion of the United States of Appeals for the Seventh Circuit (Pet. App. 1-18) is reported at 24 F.3d 966. The opinions of the United States District Court for the Northern District of Illinois (Pet. App. 20-41) are unreported.

STATEMENT

On March 15, 1991, Chicago Police Officer Anna Gall arrested petitioner Rafael Garcia ("Garcia"), who at the time was on probation for two felonies and had an out-

standing bond forfeiture warrant, for possession of a controlled substance, after observing a bag containing white powder at his feet. (Pet. App. 1) Garcia was injured in the arrest and taken to a nearby hospital. *Id.* at 1-2. The next day, while Garcia remained hospitalized and in custody, counsel (a public defender) was appointed for him and a judge found probable cause to charge him with possession of a controlled substance. *Id.* at 2. The public defender asked for a reasonable bond on Garcia's behalf. *Id.* The court set bond for violating probation and possessing a controlled substance. *Id.*

On March 18, while Garcia remained hospitalized, the court set a preliminary hearing for April 10, 1991. (Pet. App. 2) On March 20, Garcia was released from the hospital and having failed to post bond, was transferred to Cook County Jail. *Id.* On March 26, the Chicago Police Department laboratory tested the powder and found it to be negative for any controlled substance. *Id.* At the preliminary hearing on April 10, the court granted the prosecutor's motion to dismiss the case based upon the laboratory finding. *Id.*

Garcia then filed an action under 42 U.S.C §1983 seeking money damages against the City of Chicago; Officer Anna Gall; Cook County State's Attorney Jack O'Malley; Cook County Sheriff Michael Sheahan; the Cook County Department of Corrections; and then-acting Executive Director of Cook County Jail C. Richard English. (Pet. App. 2-3, 20)[1]

Garcia claimed that (1) his probable cause (*Gerstein*) hearing was inadequate because he was not brought be-

[1] We address only the claims against Cook County State's Attorney Jack O'Malley, Sheriff Michael Sheahan, and Mr. English.

fore the judge; (2) Officer Gall used excessive force to arrest him; (3) State's Attorney O'Malley, Sheriff Sheahan and Director English were responsible for detaining him without probable cause, and (4) the City of Chicago's procedures for testing substances were constitutionally inadequate. (Pet. App. 3) Defendants State's Attorney O'Malley, the Cook County Department of Corrections, and the City of Chicago and Officer Gall all filed motions to dismiss. (Pet. App. 20)

The district court dismissed the claims against State's Attorney O'Malley based on eleventh amendment immunity from civil liability (Pet. App. 22-23) and the claims concerning the adequacy of Garcia's probable cause hearing, ruling that the constitution did not require Garcia's physical presence during the proceeding. *Id.* at 24-26 Garcia sought reconsideration of the ruling and also sought leave to file a second amended complaint that in essence repeated the *Gerstein* claims. (Pet. App. 3) Sheriff Sheahan and Director English filed a motion for summary judgement. (Pet. App. 3) The district court denied both of Garcia's motions, and dismissed Sheahan and English. (Pet. App. 3, 32)

Garcia then filed a third amended complaint against only the City of Chicago and Officer Gall. (Pet. App. 3, 32) The City defendant's motion to dismiss was granted in part, the district court rejecting Garcia's claims based upon the constitutional adequacy of the laboratory tests performed upon the white powder found at his feet. (Pet. App. 35-39) The court did not dismiss Garcia's claims of excessive force and of false arrest against Office Gall and these were subsequently settled. (Pet. App. 3, 39)

Garcia then appealed, contesting the district court's dismissal of the claims against the State's Attorney, the

Cook County Sheriff and the Director of the Cook County Department of Corrections, as well as his claims based on the controlled substances testing procedures employed by the City of Chicago. The court of appeals held that the claims against the State's Attorney were barred by the eleventh amendment since under Illinois law, State's Attorneys are state, not county officials. (Pet. App. 4) The court of appeals also ruled that the constitution did not grant Garcia a right to be personally present at his probable cause hearing held the day after his arrest, and noted that Garcia never contended that he was physically capable of leaving the hospital. (Pet. App. 4-5) The court further found no constitutional deficiencies in the laboratory testing procedures employed by the City of Chicago Police Department in this case. (Pet. App. 6-9)

ARGUMENT

I.

THE FOURTH AMENDMENT DOES NOT REQUIRE THE PRESENCE OF A HOSPITALIZED ARRESTEE AT HIS PROBABLE CAUSE HEARING.

Garcia, who concedes that there was probable cause for his arrest, and who does not even now contend that he was medically capable of attending his probable cause hearing, which was held within 48 hours of his arrest, nevertheless asks this Court to expand upon its holding in *Gerstein v. Pugh*, 420 U.S. 103 (1975), and rule that the fourth amendment requires the physical presence of the person arrested without a warrant at the probable cause hearing, absent "exceptional circumstances." (Pet. 25, 27) Garcia further asserts that there existed a conscious or deliberate policy by unnamed "governmental of-

ficers" to ignore the clear mandates of an Illinois state statute requiring the presence of an arrestee at the probable cause hearing and that this "abuse of power" resulted in both fourteenth and fourth amendment violations. (Pet. 26-27)

While respondents maintain that the court of appeals correctly held that the fourth amendment did not require Garcia's presence at his probable cause hearing (Pet. App. 5), respondents agree with respondent City that Garcia failed to demonstrate his standing to raise this issue. (Brief in Opp. 5, fn. 3) As noted by the City, even if Garcia were correct that an arrestee is constitutionally entitled to personally attend a probable cause hearing, he has not explained how this requirement would be applied to a hospitalized arrestee like himself. Of course, if there were no violation of his rights because he was hospitalized, he has no "personal stake in the outcome." Therefore, he lacks standing to raise this issue. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

This court has held that the fourth amendment requires a judicial determination of probable cause either before or promptly after arrest as a prerequisite to extended pretrial detention. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661 (1991). It has never held that the fourth amendment requires the presence of the arrestee at the determination of probable cause. In *Gerstein*, the court ruled that adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. 420 U.S. at 120 The standard for making this determination is the same as that for arrest. *Id.* Further, the court approved the use of informal procedures for making the probable cause determination. 420 U.S. at 121.

Several circuits in addition to the Seventh Circuit in the instant case have specifically held that the Fourth Amendment does not require the presence of an arrestee at his probable cause hearing. *See, McLaughlin v. County of Riverside*, 888 F.2d 1276, 1279 (9th Cir. 1989), *vacated on other grounds* 111 S.Ct. 1661; *King v. Jones*, 824 F.2d 324, 327 (4th Cir. 1987). The Ninth Circuit Court of Appeals reasoned, relying upon *Gerstein*, that the fourth amendment affords those arrested without a warrant the same right to have the evidence reviewed by a neutral and detached magistrate as that enjoyed by those arrested with a warrant. 888 F.2d at 1279. The court observed that those arrested with a warrant have not attended a probable cause determination and stated "[w]e perceive no basis for holding that the fourth amendment grants warrantless arrestees such a right." *Id.* Although Garcia has pointed to no decision which finds the existence of such a right, he suggests that this Court's recent decisions in *County of Riverside v. McLaughlin*, 111 S.Ct. 1661 (1991), and *Albright v. Oliver*, 114 S.Ct. 807 (1994), support interpreting the fourth amendment to require that the arrestee be physically present for a probable cause determination made after a warrantless arrest.

Neither this Court's opinion in *McLaughlin* or *Oliver* supports such a novel and expansive reading of the Fourth Amendment. Indeed, both opinions are completely irrelevant to this issue. In *McLaughlin*, the sole issue addressed by this Court was what constitutes "prompt" under *Gerstein*, 111 S.Ct. at 1665. The Court ruled that judicial determinations of probable cause within 48 hours will, as a general matter, comply with the promptness requirement of *Gerstein*, and that after 48 hours, the burden shifts to the government to demonstrate the existence of a bonafide emergency or other circumstance. 111 S.Ct. at

1670. It is undisputed that Garcia received a judicial determination of probable cause within the 48 hour time period specified in *McLaughlin*.

In *Albright*, the petitioner, who surrendered himself to authorities after the issuance of an arrest warrant, asked this Court to recognize a substantive right under the due process clause of the fourteenth amendment to be free from criminal prosecution except upon probable cause. 114 S.Ct. at 810. The petitioner did not claim any violation of his fourth amendment rights. 114 S.Ct. at 810. While the plurality concluded that substantive due process did not apply to petitioner's claims, which should be judged under the fourth amendment, that holding does nothing to advance Garcia's view that the fourth amendment guarantees the right of an arrestee to be present at a post-arrest determination of probable cause. Further, Garcia, unlike *Albright*, does not contest that there was probable cause for his arrest. (Pet. App. 6, 24)

Rather than supporting his claim, the *Albright* decision appears to undercut Garcia's argument that his fourteenth amendment due process rights as well as his fourth amendment rights were violated because his "nonappearance" was allegedly pursuant to the "conscious or deliberate adherence by governmental officers to a policy which ignores the clear mandates of a state statute." (Pet. 26-27, 30) The court in *Albright* indicated that probable cause for arrest determinations were properly analyzed under the fourth amendment rather that under the fourteenth amendment due process clause. Thus, insofar as Garcia is contending that the alleged policy constitutes a due process violation, under the rationale of *Albright*, that constitutional provision is not applicable to probable cause determinations.

Moreover, the Seventh Circuit properly did not consider this argument since Garcia did not allege sufficient facts to show the existence of a policy that caused a constitutional violation and since he failed to attribute the supposed policy to any specific policymaker. *See, Monell v. Dept. of Social Services of City of New York*, 436 U.S. 655 (1977). Garcia merely alleged the facts in his own case, which single incident is insufficient to establish a custom or policy. *See, City of Oklahoma v. Tuttle*, 471 U.S. 808, 823-24 (1985). Further, as noted by the Seventh Circuit, Garcia never contended that he was physically capable of leaving the hospital, and he received a timely and constitutionally sufficient probable cause hearing in which he was represented by an attorney. (Pet. App. 5)

Garcia has presented no authority to this Court which supports his novel view that the fourth amendment requires the presence of an arrestee at his *Gerstein* hearing. The *Gerstein* decision itself, as well as the lower courts which have directly considered this issue, indicate that the fourth amendment imposes no such requirement. Further, Garcia does not contend that his arrest was not supported by probable cause, nor does he even contend that he was physically able to attend the hearing. Thus, there is simply no reason for this Court to consider this question.

II.

GARCIA, WHO WAS NOT INCARCERATED AT THE TIME HE FIRST FILED SUIT, LACKED STANDING TO SEEK INJUNCTIVE RELIEF, AND THE STATE'S ATTORNEY IS A STATE OFFICIAL ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

Should this Court reverse the holding below on the *Gerstein* issue, Garcia asserts that he is entitled to injunctive and declaratory relief despite the fact that he

was not incarcerated at the time he initially filed suit. Garcia further asserts that the State's Attorney should not have been dismissed from a claim for money damages on the basis of the eleventh amendment until a finding of fact was made by a federal district court concerning his status as a state or county official. (Pet. 38-56)

Neither of these claims have merit. With respect to Garcia's claim that he is entitled to injunctive and declaratory relief, he relies upon three decisions of this court. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (Pet. 41-42); *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661 (1991) (Pet. 42); and *United States Parole Comm. v. Geraghty*, 445 U.S. 388 (1980) (Pet. 42-43). In all of these decisions however, the plaintiffs filed suit while still incarcerated, unlike Garcia in the instant case. Since Garcia was not incarcerated he was not subject to any current constitutional deprivation at the time he filed suit and thus he lacked standing to bring a claim for injunctive relief.

The instant case is governed by the rule for injunctive relief as set forth in *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983): "[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the threat of injury must be both real and immediate." The plaintiff in *Lyons* was injured when he was arrested by police officers who administered a chokehold on him. The plaintiff sought an injunction prohibiting members of the Los Angeles Police Department from administering chokeholds in the future. This Court held that plaintiff lacked standing to seek the injunction because he had failed to show that he was in danger of being arrested and subjected to a chokehold in the near future. Similarly, Garcia never alleged any facts to show it is like-

ly that he would be arrested and detained without being brought before a judge and therefore he too lacks standing to seek injunctive relief. Though the court of appeals cited *Lyons* to support its ruling that Garcia lacked standing to sue for injunctive relief, Garcia makes no attempt to distinguish the case in his petition to this court. (Pet. App. 4)

With regard to Garcia's claim that further fact finding is required before it may be properly ruled that the State's Attorney is a state rather than a county official and thus entitled to eleventh amendment immunity from money damages, respondents maintain that the issue is one of Illinois law which has already been resolved by the Illinois Supreme Court in *Ingemunson v. Hedges*, 549 N.E.2d 1269, 1272 (Ill. 1990). This ruling was properly relied upon by the court of appeals in this case in ruling that the State's Attorney was a state official entitled to eleventh amendment immunity. (Pet. App. 4)

Recently, the Seventh Circuit considered the issue of the status of the State's Attorney as a state or local official in a labor context, and again relying upon *Ingemunson v. Hedges, supra*, concluded that he is a state official. *McGrath v. Gillis*, ____ F.3d ____ (No. 94-2443, decided January 6, 1995) The *McGrath* court definitively stated, "Illinois case laws holds . . . that State's Attorneys are employees of the State of Illinois." *Id.* In *Ingemunson v. Hedges*, the Illinois Supreme Court reviewed the language of the Illinois constitution, which places the office of the state's attorney in the Judicial Article, Ill. Const. 1970, Art. VI, Sec. 19, and numerous prior decisions, and ruled that State's Attorneys should be classified as state, not county officials. 549 N.E.2d at 1272.

Further, since the State's Attorney prosecutes cases pursuant to state statute, he is a state official for the pur-

pose of constitutional liability. *See, Scott v. O'Grady*, 975 F.2d 366 (7th Cir. 1992).

Despite the Illinois constitution and the recent decisions of the Illinois Supreme Court and court of appeals directly resolving the issue of whether the State's Attorney is a state official, Garcia claims that a decision of this court, *Edelman v. Jordan*, 415 U.S. 651 (1974), requires that a federal district court conduct fact finding to determine "the source of funds for payment of any judgement against" the state's attorney in his official capacity. (Pet. 47) *Edelman*, however, imposes no such requirement.

In *Edelman*, the court ruled that since the retroactive portion of the relief awarded by the district court must inevitably come from the general revenues of the state, the award was akin to a monetary award against the state itself and was barred by the eleventh amendment although the state itself was not a party to the suit and although it was argued that the relief did not constitute money damages but rather "equitable restitution." 415 U.S. at 664-666. This decision does not support the necessity of wide ranging fact-finding concerning the source of payment for damages, sought by Garcia in the present case.

Under *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the definition of "person" suable under Section 1983 does not extend either to the state itself or to official-capacity lawsuits against state officials. The court of appeals and the Illinois Supreme Court have conclusively held that the State's Attorney is a state official. Thus, Garcia has failed to allege an element of his section 1983 suit against State's Attorney O'Malley, that a "person" violated his constitutional rights. The question raised by Garcia as to which entity would pay a hypothetical

money judgement against the State's Attorney is not supported by any precedent and is entirely speculative and irrelevant. There is no merit to any of Garcia's claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

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